Supreme Court, U.S.
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No. (2) 10-612

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

DANIEL G. ANDERSON, et al.,

Petitioners,

versus

BARACK HUSSEIN OBAMA,
in his official capacity
as President of the United States,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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FILED: August 30, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 10-1951
(8:10-cv-00017-PJM)

DANIEL G. ANDERSON; WILLIAM COLLITON, MD; RICHARD P.
DELANEY, MD; GAETANO MOLINARI, MD; RICHARD LORIA, MD;
LORENZO MARCOLIN, MD; JAMES RONAN, MD; EDWARD SHERIDAN, MD;
EDWARD SOMA, MD; RICHARD USCINSKI, MD,
Plaintiffs – Appellants,
v.

BARACK HUSSEIN OBAMA, in his official capacity as President
of the United States,
Defendant - Appellee.

ORDER

Upon consideration of submissions relative to appellant's motion for a temporary injunction, the Court denies the motion.

For the Court

/s/_____
Patricia S. Connor
Clerk

FILED: September 8, 2010
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 10-1951
(8:10-cv-00017-PJM)

DANIEL G. ANDERSON; WILLIAM COLLITON, MD; RICHARD P. DELANEY, MD; GAETANO MOLINARI, MD; RICHARD LORIA, MD; LORENZO MARCOLIN, MD; JAMES RONAN, MD; EDWARD SHERIDAN, MD; EDWARD SOMA, MD; RICHARD USCINSKI, MD,
Plaintiffs – Appellants,
v.
BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,
Defendant - Appellee.

ORDER

Upon consideration of appellant's motion to reconsider, the Court denies the motion. Upon consideration of appellant's motion to expedite, the Court denies the motion. Upon consideration of appellee's motion to dismiss the appeal, the Court grants the motion. Entered at the direction of Judge Wilkinson with the concurrence of Chief Judge Traxler and Judge Gregory.
For the Court /s/ Patricia S. Connor, Clerk

FILED: September 8, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1951 (8:10-cv-00017-PJM)

DANIEL G. ANDERSON; WILLIAM COLLITON, MD; RICHARD P. DELANEY, MD; GAETANO MOLINARI, MD; RICHARD LORIA, MD; LORENZO MARCOLIN, MD; JAMES RONAN, MD; EDWARD SHERIDAN, MD; EDWARD SOMA, MD; RICHARD USCINSKI, MD
Plaintiffs - Appellants v. BARACK HUSSEIN OBAMA, in his official capacity as President of the United States
Defendant - Appellee

J U D G M E N T

In accordance with the decision of this Court, this appeal is dismissed.
This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/_____
Patricia S. Connor
Clerk

Judge Messitte's Oral Ruling from the Bench of March 18, 2010,
Transcript Pages 35 - 61

THE COURT: All right. Let's take about a ten-minute recess, and then we'll come back up.

MR. PALMER: Thank you, Your Honor.

(Recess taken.)

THE COURT: In this suit, some ten physicians have sued Barack Obama, President of the United States, alleging ultra vires conduct and a violation of separation of powers in connection with pending health care legislation. Specifically, as indicated by the Court earlier, the First Amended Complaint before the Court asks that the actions of President Obama and the members of his White House staff, in intimidating and coercing Senator Ben Nelson to vote in favor of the Senate Bill and/or – which pertaining to health care, and/or to vote in favor of cutting off further debate on the Senate Bill by threatening to take executive action detrimental to the citizens of Nebraska, as unconstitutionally usurped powers of the Legislative Branch in violation of the Doctrine of Separation of Powers.

Now, the further request in the First Amended Complaint is that the Court enjoin the President and members of the White House staff from undertaking in the future to intimidate and coerce any members of Congress to vote in favor of any Health Care Bill or cut off debate.

In addition, there are independent requests that the Court declare any resulting reconciled emerged Health Care Reform Bill presented in the Congress or by

the Congress to the President null and void as a product of ultra vires and unconstitutional acts, and enjoin any reconciliation or merged Reform Bill presented by Congress to the President from going forward.

The Court has already indicated that Congress is not a party to the present suit and, therefore, the Court is not asked to rule nor does it have any opportunity or occasion to rule on what the Congress may or may not do and what Bill may or may not be passed. But I will address the specific request insofar as the President is concerned in dealing with members of Congress.

The plaintiffs, all distinguished physicians, have sought a preliminary injunction with regard to these particular actions by the White House, the President particularly. The Defendant President has moved to dismiss the case. The matter is then on the Court's docket as a Motion to Dismiss in the first instance as to whether in fact a viable cause of action has even been stated.

The factual background is that on or about November 18, 2009, the United States Senate introduced the Patient Protection and Affordable Care Act. On December 21st, 2009, the Senate voted to cut off any further debate on the Senate Bill by a vote of 60 to 40. It is alleged that, prior to this vote, President Obama and/or other members of his White House staff met in closed-door session with Senator Ben Nelson of Nebraska on several occasions.

And according to plaintiffs, during these closed-door sessions, the President and/or members of his staff threatened to put Offutt Air Force base in Nebraska on the list for base closures unless Senator Ben Nelson were to vote in favor of health care legislation. From that emanates then a request for preliminary injunction on the

part of the plaintiffs. From that, the Motion to Dismiss on the part of the defendant.

The Court then considers the Defendant's Motion to Dismiss. With regard to the justiciability and the standing of the plaintiffs to bring this action, the defendant, the President, argues that the plaintiffs lack standing because they have suffered no injury, no cognizable injury, and there is no relief the Court can order. The second argument is that the scope of the President's role influencing legislation is a nonjusticiable political question.

And the plaintiffs' view, of course, is that they do have standing to raise this issue and that they, further this is a justiciable issue, because whether the President has violated the Doctrine of Separation of Powers is a political question.

The Court considers first the defendant's arguments, that the plaintiffs have suffered no injury to a legal protected interest and thereby lack standing. And, again, that is the first contention of the defendant, that the plaintiffs have suffered no legally cognizable injury. None of the purported harms to the medical profession constitute, constitutes a legally cognizable injury.

First, the complaint and an affidavit, according to the defendant, do not identify any legally protected interests plaintiffs possess or any particular provision of either Bill, which is still very inchoate, that if it became law would invade that interest. And even supposing that the plaintiffs had a legally protected right to practice medicine, they have pointed to no legal right to, quote, the practice of medicine as we have known it, end quote, or to the, quote, sacred binding of the dedicated physician and the sick patient, end quote.

The second argument that the defendant makes

with regard to the failure of plaintiffs to have suffered any legally cognizable injury is that any harm to the plaintiffs is not concrete or particularized, that the plaintiffs do not identify any harm from health care reform personal to them. Rather, what they complain of is a potential injury to the practice of medicine as a whole.

And finally, plaintiffs are said to lack standing because any harm to them is not actual or imminent. Their supposed injuries are highly speculative. The health Care Reform Bills cannot affect plaintiffs or anyone else unless and until they became law, and unless the law and until the law, that law, such as it may be, is enforced.

The effect that a bill might have if it became a law is inherently a matter of conjecture and speculation, so says the defendant. And no one can say for certain that any bill will become a law or what provisions of that hypothetical law will be or what effect these hypothetical provisions will have if enforced. There's pure conjecture about health care reform and so on based on numerous questionable assumptions.

As far as the redressability of the Complaint, the Court, according to the defendant, is not able to order any relief that the plaintiffs request. The President is the only defendant in this suit as of today. The Complaint makes it clear he's being sued in his official capacity. The Court is asked to enjoin the President from coercing any member of Congress to vote in favor of any Health Care Bill and from enforcing the Health Care Bill if Congress passes it.

They ask for a declaratory judgment that the president coerced Senator Ben Nelson to vote for the Health care Bill and that this coercion was beyond the President's authority, violated the Doctrine of Separation of Powers, and thereby renders the Bill, such as it may

be, void.

Since this would, this is all relief that would operate on the President in his official capacity and in the performance of what are non-ministerial actions, it would be beyond the Court's power to grant.

The defendant cites *Newdow vs. Bush*, among other cases, 391 F.Supp.2d, 95, 105, from the District of Columbia District Court, that in that case the issuance of an injunction or declaratory judgment against the President draws the Court itself into serious separation of powers issues.

In particular, there is a long-standing legal authority that Courts cannot issue injunctions against the co-equal executive and legislative branches of our government.

It is true that the President – this is all the argument made by the defendant. It is true that, the President – this is all the argument made by the defendant. It is true that, while presidential immunity does not, under *Nixon vs. Fitzgerald*, bar every exercise of jurisdiction over the President of the United States, the cite is 457 U.S. 731 at 753-54, a 1982 Supreme Court case, none of the exceptions to that bars are present here. According to the defendant, plaintiffs are relying principally on *Youngstown Sheet & Tube Company vs. Sawyer*, at 343 U.S. 579, a 1952 case from the Supreme Court, in contending that an injunction would be appropriate.

But the position of the defendant is that that case is inapposite. It involved no injunction on the President. Rather the Secretary of Commerce was enjoined from enforcing a presidential order. And the Supreme Court specifically held in that case, quote, While injunctive relief against Executive officials, like the Secretary of Commerce, is within the Court's power, end quote, injunctive relief against the President himself is not. And

to that extent, the case is further invalid in going forward.

The argument further in the *Nixon* case that I cited is that the President's unique status under the constitution distinguishes him from other Executive officials. This does not mean, according to the defendant, that the President is above the law or that Executive actions are unreviewable. There remains the constitutional remedy of impeachment, as well as a constant scrutiny of the President by the media and Congress, and the President's concern, of course, for public opinion and reelection. Courts can also review the constitutionality of the President's actions in suits against lower executive officials.

The issue of course that the, as further followed by the defendant in this case, is that, even if the Court were in a position to grant some of the relief the plaintiffs request, the suit would still lack redressability. Plaintiffs are not Congressmen who feel coerced. They are not ones who have been threatened by the President. They are doctors. They are private citizens, and their only claim to injury is that if these inchoate Health Care Reform Bills now pending in the Congress become law, then the enforcement of that law would injure them.

It's sheerly speculative at this point, says the defendant, that if this Court were to enjoin the President from involvement in health care reform or declare the pending Bills void, then no similar Health Care Reform Bill would become law. It is, it must be likely, as opposed to merely speculative, that the injury would be redressed by favorable decision. And according to the defendant, the plaintiffs are not able to show this redressability. That's according to the *Lujan* case at 504 U.S. at 561.

The further argument made by the defendant in this case is that the scope of the President's role in influencing legislation is a non-justiciable political

question, and that is the essential second argument. According to the defendant, the gravamen of the Complaint is that the President overstepped his constitutional role in attempting to influence legislation and secure its passage.

Plaintiffs say this violates the separation of powers for the President to use a threat to exercise an otherwise legitimate executive power to intimidate or coerce individual members of Congress to vote for a bill, and for the President to arrange a meeting between Congressmen and other leaders to discuss the Bill.

Plaintiffs have cited no other case challenging the President's authority to encourage or discourage members of Congress from voting for pending legislation or to arrange meetings to discuss pending legislation. The government is aware of none.

In any event, the defendant says the issue is clearly nonjusticiable because it is impossible for the Court to undertake an independent resolution of the issue without expressing a lack of respect due to the coordinated branches of government. There is a texturally demonstrable constitutional commitment to the issue to a coordinate political department, and therefore – and further, that there are no judicially discoverable or manageable standards to resolve the issue, citing the seminal case of *Baker vs. Carr* at 369 U.S. 186 at 217, a 1962 case of the Supreme Court.

Among the arguments made by the defendant in this respect is that the Court cannot consider the merits of this issue without evincing a lack of respect for congress and the President. The Court is asked to review these closed-door meetings between the President and Senator Nelson, during which they supposedly discussed a Bill pending in the Senate, and a meeting between President Obama, Congressmen, union leaders and others to discuss the pending legislation.

Plaintiffs ask for an injunction that would restrict what the President could say to members of Congress and others about pending legislation. Any such inquiry or injunction would interject the Court into political discussions about Bills before Congress and would seriously interfere with the relationship between the political branches.

Further, says the President, the issue of presidential influence on pending legislation is committed to the political branches. The Constitution gives Congress all legislative powers of the federal government, including as the plaintiffs point out, the power to make laws which shall be necessary and proper for carrying into execution its enumerated powers.

Also, Article One and Two assign responsibilities to the President that directly relate to the law-making process. The President has the power to sign or return a Bill passed by a Congress and the power to recommend to their consideration such measures as he shall judge necessary and expedient, specifically citing the constitution at Article One, Section Seven, and Article Two, Section Three.

The judicial authority and contrast extends only to cases and controversies under federal laws in the Constitution, this pursuant to Article Three, Section Two of the Constitution. Among other things, the *Hayburn's* case, as far as back as 1792, held that the Court lacks the power to issue advisory opinions. This at 2 U.S. 408.

According to the defendant, it is difficult to imagine a case or controversy proper for judicial resolution that concerns a Bill that has not already become a law. And call it reverting back to the *Baker vs. Carr*, there was in fact an express indication that the enacting process for legislation generally presents a political and therefore a nonjusticiable question.

It is hard to understand, says the defendant, how judicially manageable standards could be applied in this hearing. There are no standards proposed by the plaintiff as to how the judiciary might separate legitimate presidential discussions with members of Congress from those supposedly illegitimate, coercive or intimidative actions by the White House.

Plaintiff has not made the clear showing that they would clearly prevail on the merits of this case. And therefore, according to the defendant, these issues are nonjusticiable, the Court lacks jurisdiction. And that's what it comes to in the end, whether the Court can even entertain this case because of these impediments. That is the position of the defendant.

Now, responsively, the plaintiffs do assert that they are in a position to pursue this case because they have standing and because these issues are justiciable. According to – obviously, the basic proposition is that a physician and under some circumstances does have standing to raise his own rights. And the argument is that to the extent that either Health Care Bill or the health Care Bill, if enacted, will prevent plaintiffs from practicing medicine in a safe and effective manner, is the argument that plaintiffs put forth in support of the argument that they have standing.

They feel that either Bill, if enacted into law, would force them to practice medicine deficiently and would require them to subject their patients to increased medical risk by, for example, subjecting their patients to long waiting periods for treatment and care. And they contend that they have a strong personal stake in the argument and that plaintiff physicians have standing to the extent that they claim either bill, if enacted into law, would impair their constitutional right, quote, to freely practice medicine to the highest medical standards without arbitrary outside restraints. Citing some

language from *Nyberg vs. City of Virginia* at 495 F.2d 1342 at 1344, an Eighth Circuit case from 1974, as to which certiorari was denied.

The plaintiffs also contend that they have standing to the extent that either of any health care legislation, if enacted, with irreparably impair the patient-physician relationship between plaintiffs and their patients described as a unique fiduciary-like relationship that exists between the doctor and the patient.

According to the plaintiffs, these are sufficiently concrete and particularized harms, since they would directly affect each plaintiff physician in his or her practice of medicine and would implicate interests that are not common to the entire public.

The Court further, according to the plaintiffs, has the; power to grant the relief that the plaintiffs request and that the, not only is the standing, standing available but redressability is possible. The enjoining the President from coercing and intimidating members of Congress to vote in favor of a particular piece of health care legislation through threats to exercise executive powers to the disadvantage of the members' constituents would fully redress the complained arbitrary use of power and aggrandizement of legislative powers by the President. That is the argument of the plaintiffs.

And further, that it is, quote, sheer speculation that if this Court were to grant the requested declaratory and injunctive relief, then no similar Health Care Reform Bill would become law. It is not pure speculation, however, say the plaintiffs, that granting the requested declaratory and injunctive relief would prevent an unconstitutional concentration of power in the Executive Branch of government.

Further on the issue of separation of powers and whether this is a justiciable as opposed to a political

question, the plaintiffs argue as follows: It is correct that a controversy may be termed political, but the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Citing to this effect *INS vs. Chadha* at 462 U.S. 919 at 943, a 1983 case.

And in that same case, plaintiffs invite the Court's attention to the language as follows: "Resolution of litigation challenging the constitutional authority of one of three branches cannot be evaded by courts because the issues have political implications in the sense urged in that case by the President."

The further argument made by the Plaintiffs is that the President appears to be arguing that judicial intervention regarding the constitutionality of his actions and threatening to use his executive powers as a means of pressuring members of Congress to vote for or against a particular piece of legislation shows a lack of respect because Congress itself has the ability to defend its powers from encroachment by the President.

In other words, the suggestion by the defendants, says plaintiffs, is that the political branches can adequately regulation their relationship with each other and keep each other within proper bounds regarding pending legislation without the need for judicial intervention.

But the plaintiffs argue that the Supreme Court has held that the fact that one institution of government may have mechanisms available to guard against incursions into its power by other governmental institutions does not require that the judiciary remove itself from the controversy by labeling the issue a political question. To this effect, *United States vs. Munoz-Flores* at 495 U.S. 385 at 393, a 1990 case.

The argument of the plaintiffs is that the standards set forth in *Youngstown Sheet & Tube* and

similar cases suffice to determine when the President has engaged in an inappropriate form of coercion and intimidation that would violate the separation of powers doctrine, as opposed to more benign forms of coercion and intimidation plaintiffs concede that presidents have always used to obtain passage of desired legislation, which do not, according to plaintiffs, run afoul of that fundamental constitutional doctrine.

And those standards, according to the plaintiffs, citing again the *Chada* case, foresaw reliance by the Court on nonjudicial policy determinations or any showing of disrespect for a coordinate branch. Accordingly, the plaintiffs conclude that the issues that they raise in their Complaint are justiciable, and the Court may adjudicate them without running afoul of the political question doctrine.

The Court has already intimated, in terms of discussions, that it is a, it is not an all-purpose Court that can decide all issues where people feel aggrieved, whether they are ordinary citizens or whether they are physicians who may have, in some indirect ultimate way, be affected by legislation. There are well established principles about when a Court can and cannot intervene to take certain action against coordinate powers of the government.

Here, to boil this case down, the Court is basically ordered to intervene in White House activities pertaining to legislation. And really, the implication goes way beyond health care legislation. It's any legislation, and keep the White House from having discussions that would be coercive, which would require the Court to develop standards of how and when the Court would go in behind the closed doors and determine whether actions discussed or proposed or even threatened do or do not invade legislative powers.

The Court must agree with the defendant that it

lacks jurisdiction in this case because the plaintiffs do not have standing. Not to say that they're no unhappy about this legislation, not to say that they won't ultimately feel some effect from the legislation, but this Court has limited authority to grant people access to challenge the kind of action that's challenged here.

The idea of forcing doctors, quote, to practice medicine deficiently, end quote, or discussion of their constitutional right, quote, to freely practice medicine to the highest medical standards without arbitrary outside restraints, or, quote, in a safe and effective manner, there is not constitutional right that that applies to. The cases that have been discussed, the abortion cases, are cases in which doctors in fact are either, are facing possible criminal prosecution for complying or not complying with certain state laws. There simply is no recognized constitutional right, quote, to freely practice medicine to the highest medical standards. It's just too vague.

The Supreme Court, in *Whalen vs. Roe* at 429 U.S. 589 at 604, Note 33, rejected the argument that doctors have a, quote, right to practice medicine free of unwarranted state interference, end quote. There the Court held that, quote, a doctor's right to administer medical care as no greater strength than his patient's right to receive such care, end quote. And there, restrictions on abortion can violate a doctor's constitutional rights because they impact upon the woman's freedom to make a constitutionally protected decision. But on the other hand, restrictions on the medical profession, which really make the physicians work more laborious or less independent, are not violative of the Constitution.

The issue, of course, as well is whether these harms so alleged are sufficiently concrete or particularized. Plaintiffs argue that they are because they would directly affect each of their ability to practice medicine and would

implicate interests not common to the entire public. But again, there is no specificity about how they are forced to practice medicine deficiently nor how their practices will be affected by an impersonal system of medicine. Deficient medicine is simply too vague a standard. To talk about long waiting periods or impersonal doctor-patient relationships is simply too vague and conjectural to allow any sort of standing.

And the actual imminent nature of the harm, as well as its, as opposed to its conjectural or hypothetical nature, is another reason why the Court concludes that it is not, in this instance, able to recognize standing. And if there's no standing, there's no jurisdiction. To argue that harm is imminent given that the defendant is actively seeking legislation, passage of legislation, does not suffice.

Assuming passage of the Bill of a law is imminent, it's still not shown that the application of the law would be, create harm. Many provisions may not take effect until some years down the road. And even then, the law may or may not affect plaintiffs at all or not in the ways that they now anticipate. If and when the harms that they fear materialize, then they are not precluded from bringing appropriate challenges. The Court then may be able to revisit the issue, whether the claims they seek here are either justiciable or redressable.

The Court has, then wants to say a few more words in conclusion about the redressability of this particular claim. The issue is whether the President himself can be enjoined in the kind of, from the kind of action that he is alleged to have taken here. Injunctive relief against the President himself would be an extraordinary proposition.

I know that the plaintiffs are suggesting that they would offer, add other White House staff arguing that they could proceed against other White House staff, such as Rahm Emanuel. That doesn't cure the redressability

problem. They still ultimately would have to enjoin the President himself, and the Court doesn't find any authority for doing that. The Court does find that it would involve an unconstitutional invasion of the rights of the Executive here.

And then finally, on the political nature of this requested relief, the Complaint, according to the defendant, fails to state facts upon which a relief could be granted. It raises again only these nonjusticiable political issues. There are some separation of powers issues, but plaintiffs are not, claims are not among them. Again, what this case demonstrates, if anything is the impossibility of the Court undertaking an independent resolution without expressing lack of – due to a coordinate branch of government.

The Court would need to conduct a detailed inquiry into closed-door meetings between the President and the Senator and determine what the President said to the Senator, what the Senator said to the President, what the President's intentions were in making those remarks, what the Senator understood those remarks to mean.

And the Court would have to make a detailed inquiry into the Senator's motivations and determine whether the Senator voted for the Bill beause he was persuaded that health care reform would benefit the country or because he feared that some action might be taken by the President as threatened. And the Court could not undertake that kind of inquiry without seriously and inappropriately intruding into the legislative process. Again, this comes in the end to a lack of respect for both the President and the Congress.

As stated earlier as well, there are no judicially discoverable or manageable standards for resolving plaintiffs' claims,, which again leads to the political nature of the request rather than a judiciability issue.

Plaintiffs, for example, specific that more benign forms of coercion and intimidation that all presidents have used in order to obtain passage of legislation, including veto threats, the bully pulpit, and appeals to political loyalty would be okay, would be constitutional.

But the kind of coercion that purportedly went on here would not be, and again, the Court would have to enter behind closed doors to determine what happened in a given instance and, again, certainly not limited to health care reform, but any issue that might aggrieve even one profession more than another based on prospective legislation. This is not the kind of issue that gives the Court a handle on the standards that could be applied in this case.

And the Court reaches the conclusion that the issue is nonjusticiable. And all that said, the Court reaches the conclusion that this Complaint must be dismissed and, accordingly, the Complaint is dismissed as to the current defendant.

Now, I need to put to the defendant, this is, it's no longer the President, so there's really no longer any pending defendant in the case. There is, however, a Second Amended Complaint that has been put in, and the question at this point is the following, whether the Court simply dismisses this case, closes this case, requires a refilling of a new case by the plaintiffs against the other people to be named. And I see in the Second Amended Complaint, they were naming the Speaker of the House, Ms. Pelosi, and the Majority Leader, Mr. Hoyer, and the Majority Whip, Mr. Clyburn, as additional defendants in this case.

They have filed as well a Motion for Leave to File a Second Amendment Complaint, and the question is whether the government's position is that it wishes to file an opposition for the Motion to Leave to Amend or

whether its view is that it should have, for one reason or another, have the Court simply dismiss this case and leave it to plaintiffs if they so choose to file the Second Amended Complaint and then go forward.

I might say that the, some of the same issues, obviously are going to come forward in the case against the congressional leadership, but the, and the position of those defendants could be raised by way of an opposition to the Motion to Amend, or the plaintiffs could be put to the task of refiling a suit against those individuals. So I put that out there. Obviously, I understand, from your standpoint, Mr. Palmer, you'd like to be able to keep the case going with at least issues as to these particular or other defendants to be raised.

MR. PALMER: I think it's fair to both sides, Your Honor, and I think the measured consideration. For all Americans, I think we should give –

THE COURT: Give these folks a chance to consult and see how they want to proceed with it. I mean I will give you leave to a paper in opposition to the Motion for Leave to Amend at this point. They have moved to amend. You may file a paper in opposition, and that perhaps is the way to resolve it.

MS. MYERS: Yes, Your Honor, that would be agreeable to the government.

THE COURT: All right. How much time do you think you need to file? You just got, well, you have to serve. Are you going to accept service for the defendants?

MS. MYERS: Yeah.

THE COURT: You do that you've got –

MS. MYERS: We'll accept service.

THE COURT: All right. That's understood then and that's a fair accommodation to get this moving

quickly so that you will accept service for Defendants Pelosi, Hoyer and Clyburn. And then how much time do you want to respond?

MS. MYERS: Two weeks, Your Honor.

THE COURT: Fair enough, two weeks to respond and how much time to reply, two more weeks beyond?

MR. PALMER: Be happy to have the same time, but we'll certainly try to do that.

THE COURT: Well, you want to see what they say I suspect.

MR. PALMER: We think time is of the essence, Your Honor.

THE COURT: Well –

MR. PALMER: We'll know as more of this comes into focus over the weekend.

THE COURT: Well, who knows? I mean some of your arguments may change depending on whether there's a law by then. You probably ought to wait and see. Then we're not talking entirely about speculative possibilities. You've got something hard and fast in front of you.

All right. I'll give the Motion to Dismiss as to Defendant Obama is granted, granted with prejudice as to Defendant Obama. The case remains open, and service will deem, be deemed accomplished as to new Defendants Pelosi, Hoyer and Clyburn. They will have two weeks to file an opposition to the Motion for Leave to File a Second Amended Complaint. The plaintiffs will have two weeks thereafter to file an opposition, a reply, excuse me.

MR. PALMER: Your Honor, we enjoyed being with you on behalf of my plaintiffs and –

THE COURT: Well, let me close with this statement. This is obviously a very hot button issue, one of the more hot button issues of our time. In no way is this meant to say anything negative about the plaintiffs, about their integrity or their, their good faith in believing what they believe. I would observe that there are other people in America who hold other views about this particular legislation, which is perhaps, in the end, the reason why this Court does not get involved in these political debates. It really is an executive legislative topic.

But in any event, the only final word I say, but I think I hinted to you earlier, I'm always impressed how American citizens feel that Courts really are the ultimate repository of relief, and sometimes we are and sometimes we aren't. Particularly, as I travel around the world, which I do much of, we are the gold standard, it's true, in our judicial system, but we don't do everything for all people all the time. But under the circumstances, I think we do pretty well.

MR. PALMER: And Your Honor would not be offended if, in the interim, we appealed the decision?

THE COURT: Absolutely, I think that's what you want to do. Now, you may have a problem with the pending Motion to Amend. That's, you're going to be in a situation where, unless I give you a final order, you're going to be in a difficult situation.

One of the reasons why I've given you an oral opinion today is because I am where I am on this opinion and, if you want to appeal it, you're ready to do it with an expedited transcript. You don't have to wait for me to write an opinion. Now, you need to think about that right now because, if you do want to appeal it, my suggestion to you and my strong suggestion is that you not go forward with the Second Amended Complaint, that you reserve that as a separate suit. I'll issue a final order in this case

and you can take it up.

MR. PALMER: If we may, Your Honor, because, as Your Honor has correctly observed, these are quickly developing moving issues. We want to wait and see what the weekend brings.

THE COURT: All right. Well, let me leave it to you this way. Right now, the case is not dismissed, so the case remains open. It's dismissed as to the President. It remains open now as to the other three defendants, although with an opposition to, to their being in the case to be filed by them. If you decide before the government decides that you want to appeal this case, I suggest you simply withdraw your Motion for Leave to Amend, and then we can enter a final order in the case.

MR. PALMER: And not to proffer it respectfully, Your Honor, as far as our reading, which its not, but if Your Honor would be kind enough to take home the Second Amended because you'll be seeing it in the next case.

THE COURT: Well, no, I have it. I mean I'll look at it as we –

MR. PALMER: Glance through it. It's the first day of spring this weekend. With the news, you'll see that you have on your lap something that is on that TV.

THE COURT: All right. Well, I'm sure I'll follow the debate as everyone will. But what I'm leaving you with, Mr. Palmer, is if you decide that you want to appeal this, I think almost certainly, without having this bounce back to you, you're going to have to close out this case and having nothing pending in it because this would be a partial appeal.

MR. PALMER: We understand that, and I want to discuss it, of course, with the plaintiffs.

THE COURT. All right. Very well.

All right. Thank you, folks.

MR. PALMER: Thank you for your time.

MS. MYERS: Thank you.

(Recess taken at 12:30 p.m.)

CERTIFICATE OF COURT REPORTER

I, Linda C. Marshall, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/_____
Linda C. Marshall, RPR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.

Plaintiffs,

v.

BARACK OBAMA, in his official capacity as President of the United States

Defendant.

Civil No. PJM 10-17

O R D E R

Upon consideration of Defendant's Motion to Dismiss [Paper No. 31] and Plaintiffs' Opposition thereto, oral argument having been held thereon, it is for the reasons stated on the record, this 18th day of March, 2010

ORDERED

1. Defendant's Motion to Dismiss [Paper No. 31] is GRANTED with prejudice as to Defendant Barack Obama;

2. Service of Plaintiffs' Motion to Amend [Paper No. 42] and Second Amended Complaint [Paper No. 39] is deemed accomplished as to Defendants Nancy Pelosi, Steny Hoyer, and James Clyburn;

3. Defendants Pelosi, Hoyer, and Clyburn have fourteen (14) days from the day of this Order to file an opposition to the Motion to Amend; and

4. Plaintiffs have an additional fourteen (14) days to reply to the same.

/s/_____
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL ANDERSON, et al.

Plaintiffs

v.

BARACK OBAMA, et al.

Defendants

MEMORANDUM OPINION

Plaintiffs Daniel Anderson, et al. have sued President Barack Obama, alleging that he engaged in ultra vires conduct by coercing a U.S. Senator's vote on the health care reform bill and, in doing so, violated the separation of powers doctrine under the Federal Constitution. Plaintiffs seek to amend their Complaint to add one more Plaintiff, to add as Defendants Speaker of the House of Representatives Nancy Pelosi, Majority Leader of the House of Representatives Steny Hoyer, and Majority Whip of the House of Representatives James Clyburn, and to add two counts alleging that all Defendants violated the Origination Clause and the Bicameralism and Presentment Clauses of the Constitution. [Paper No. 42]Plaintiffs have filed two Motions for Preliminary Injunction [Paper Nos. 4 and 40]. The first asks that President Obama be enjoined from coercing or influencing Members of Congress to vote in favor of a health care reform bill. The second requests that the President be enjoined from either signing or enforcing the health care reform bill.

Plaintiffs have also filed a Motion to Deem Opposition to Plaintiffs' Motion to Amend Waived [Paper No. 52]

because proposed additional Defendants Pelosi, Hoyer and Case 8:10-cv-00017-PJM Document 56 Filed 07/28/10 Clyburn did not file an opposition to the Motion within the court-ordered time period.

Lastly, Plaintiffs have also filed a Motion for Reconsideration [Paper No. 54] of the Court's Order of March 19, 2010, dismissing President Obama from the case with prejudice.

For the following reasons, Plaintiffs' First Motion for Preliminary Injunction [Paper No.4] is deemed **MOOT.** Their Second Motion for Preliminary Injunction [Paper No. 40] is **DENIED.** Their Motion to Amend/Correct Amended Complaint [Paper No. 42] is **DENIED** as to President Obama, but **GRANTED** as to Pelosi, Hoyer and Clyburn. Plaintiffs' Motion to Deem Opposition to Plaintiffs' Motion to Amend Waived [Paper No. 52] is **DENIED.** Their Motion for Reconsideration [Paper No. 54] is **DENIED.**

I.

On November 18,2009, the United States Senate introduced the Patient Protection and Affordable Care Act ("PPACA"). On December 21,2009, the Senate, by a vote of 60 to 40, voted to cut off all further debate on the Act. Three days later, the Senate voted to pass the Act by a vote of 60 to 39. Senator Ben Nelson from Nebraska, voted in favor of the bill. Plaintiffs allege that prior to the final vote, President Obama and/or members of his White House staff met in closed-door sessions with Senator Nelson on several occasions. According to Plaintiffs, during the closed-door sessions, President Obama and/or members of his staff threatened to put Offutt Air Force Base on the Base Realignment and Closure ("BRAC") list, slating the base for closure, unless Senator Nelson voted in favor of the health care reform bill. Offut Air Force Base, in Southeastern Nebraska, employs some 10,000 military and federal employees. Plaintiffs allege that the threat to close Offut Air Force

Base was an effort to extort Nelson's vote for passage of the bill. They submit that such extortion amounts to ultra vires conduct and violates the separation of powers doctrine. Plaintiffs seek a declaratory judgment that the PPACA is null and void because it is a product of President Obama's ultra vires acts and his usurpation of legislative power.

On January 15, 2010, Plaintiffs filed a Motion for Preliminary Injunction, which sought an order that President Obama to cease and desist from intimidating or coercing any Member of Congress to vote in favor of the health care reform bill. In response, President Obama filed a Motion to Dismiss.

At a hearing on March 18, 2010, the Court deferred ruling on Plaintiffs' Motion for Preliminary Injunction [Paper No.4], but granted Defendant's Motion to Dismiss [Paper No. 31] with prejudice as to President Obama.1 At the hearing, Plaintiffs sought leave to amend their Complaint to add several new counts, add a new Plaintiff, and add Nancy Pelosi, Steny Hoyer, and James Clyburn as Defendants. Attorneys from the Department of Justice, representing President Obama in the proceedings, informed the Court that they would accept service on behalf of Pelosi, Hoyer, and Clyburn. On the assumption that acceptance of process by the attorneys was proper, the Court declared service accomplished as to those Defendants and gave them 14 days to file an opposition to Plaintiffs' Motion to Amend.

Although President Obama was dismissed from the case during that hearing, he is again named as a defendant in Plaintiffs' proposed Second Amended Complaint and he has filed responses to Plaintiffs' subsequent motions.

One day before Defendants' Opposition to Plaintiffs' Motion to Amend was due to be filed with the Court, attorneys from the Department of Justice apparently discovered that they lacked authority to accept service on behalf of Pelosi, Hoyer, and Clyburn. That same day, the

Justice Department attorneys informed Plaintiffs' counsel of the error and advised that proper service could be made on the Office of General Counsel for the House of Representatives (OGC). Plaintiffs' counsel, however, refused to consent to Defendants' request for an extension of time for filing an opposition and apparently has yet to serve either the OGC or Pelosi, Hoyer, and Clyburn individually, claiming that the Department of Justice in fact possessed the requisite authority, either actual or implied, to accept service and those proposed Defendants, having failed to oppose the Motion to Amend within 14 days, should be deemed to have waived any opposition to same.

II.

A.

The Court considers first Plaintiffs' Motions for Preliminary Injunction and Plaintiffs' Motion for Reconsideration. The First Motion for Preliminary Injunction, which requested the Court to enjoin President Obama from coercing or influencing Members of Congress to vote in favor of a health care reform bill, [Paper No.4] is **MOOT,** inasmuch as the PPACA has already been passed by Congress and signed into law by the President. The Second Motion for Preliminary Injunction, which seeks to enjoin President Obama from either signing or enforcing the PPACA, [Paper No. 40] is **DENIED** because the Court lacks power to grant the requested relief. The Court has no jurisdiction to issue an injunction against the President in his official capacity and in the performance of non-ministerial actions. *See Franklin v. Massachusetts,* 505 U.S. 788, 802-03 (1992) (plurality opinion) (courts in general have "no jurisdiction of a bill to enjoin the President in the performance of his official duties") (internal citations omitted).

Plaintiffs also ask the Court to reconsider its March 19, 20 I0 Order, granting President Obama's Motion to Dismiss. Plaintiffs, however, have failed to establish that

the Court overlooked an argument that might have materially affected its Order
dismissing President Obama with prejudice. *See Royal Ins. Co. of America* v. *Miles & Stockbridge P.c.,* 142 F. Supp. 2d 676, 677 n. 1 (D. Md. 2001) (motion to reconsider granted when court overlooked argument that compelled judgment in movant's favor). In issuing the Order, the Court considered all of Plaintiffs' arguments presented during the March 18 hearing. The arguments presented in the Motion for Reconsideration replicate those made at the hearing. A "motion to reconsider is not a license to reargue the merits." *Jd.* Accordingly, Plaintiffs' Motion for Reconsideration [Paper No. 54] is **DENIED.**

B.

The Court next considers Plaintiffs' Motion to Amend/Correct their Amended Complaint. "The Court should freely give [plaintiffs] leave [to amend their complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, courts are given discretion
to deny motions to amend when "the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards* v. *City of Goldsboro,* 178 F.3d 231,242 (4th Cir. 1999) (quoting *Johnson* v. *Oroweat Foods Co.,* 785 F.2d 503, 509 (4th Cir. 1986)). "Leave to amend ... should only be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face." *Johnson,* 785 F.2d at 510-11. Plaintiffs' proposed Second Amended Complaint is clearly insufficient with regard to President Obama. The Court, in its Order of March 19, 20 I0, granted President Obama's Motion to Dismiss with prejudice because the claims against him were neither justiciable nor redressable.

The addition of Counts III and IV in Plaintiffs' proposed Second Amended Complaint does not affect the lack of justiciability or the non-redressability of their

claims against President Obama. Amended or not, these claims still raise non-justiciable political questions. *See Baker* v. *Carr,* 369 U.S. 186,217 (1962) (political questions exist when: (I) the issue is constitutionally committed to a political branch; (2) there is a lack of judicially manageable standards; or (3) resolution would express lack of respect to Legislative and Executive branches). The relief Plaintiffs seek is also nonredressable.
See Franklin v. *Massachusells,* 505 U.S. 788, 802-03 (1992) (plurality opinion) (courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties"). Without a redressable injury, the Court has no jurisdiction to adjudicate the case. *See id.* at 80 I ("To invoke the constitutional power of the federal courts to adjudicate a case or controversy under Article III, [plaintiffs] must allege and prove an injury 'fairly traceable to the [plaintiffs'] alleged unlawful conduct and likely to be redressed by the requested relief.") (internal citations omitted). Since any amendment with regard to President Obama would be futile, *see Johnson,* 785 F.2d at 510-11, Plaintiffs' Motion to Amend/Correct Amended Complaint is **DENIED** as to President Obama.
During the March 18 hearing, attorneys from the Department of Justice stipulated that they would accept service for proposed additional Defendants Pelosi, Hoyer, and Clyburn and consequently the Court deemed service accomplished as to these individuals. However, the Court now accepts the Department of Justice attorneys' representation, based on their subsequent discovery, that they lacked authorization to accept service on behalf of Pelosi, Hoyer, and Clyburn. The Court will therefore **DENY** Plaintiffs' Motion to Deem Opposition to Plaintiffs' Motion to Amend Waived. Since Pelosi, Hoyer, and Clyburn have yet to file an opposition to Plaintiffs' Motion to Amend/Correct Amended Complaint, Plaintiffs' Motion as to them is **DEFERRED** and Plaintiffs shall have thirty (30) days from the date of this Memorandum

Opinion and
Order to properly serve the OGC or these individuals individually with a copy of their Motion to Amend/Correct and the proposed Second Amended Complaint. Subject to reasonable extensions, Pelosi, Hoyer, and Clyburn shall have 20 days from the date they are served to file an opposition to this Motion.

IV.

For the foregoing reasons, decision on Plaintiffs' Motion to Amend/Correct Amended Complaint [Paper No. 42] is **DENIED** as to President Obama and **DEFERRED** as to proposed additional Defendants Pelosi, Hoyer and Clyburn. Plaintiffs' Motion to Deem Opposition to Plaintiffs' Motion to Amend Waived [Paper No. 52] is **DENIED.** Plaintiffs' Motion for Reconsideration [Paper No. 54] is **DENIED.**

Except insofar as the Court may grant reasonable extensions, Plaintiffs shall serve proposed Defendants Pelosi, Hoyer and Clyburn within 30 days hereof individually or through the Office of General Counsel of the House of Representatives ("OGC") and those individuals shall have 20 days after they are served to respond to the Motion toAmend.

A separate Order will issue.

JUI~1, **2010**

PET R J. ESSITTE

UNITED ST S DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 10-17

DANIEL ANDERSON, et al.

Plaintiffs,

v.

BARACK OBAMA, et al.

Defendants

ORDER

Upon consideration of various pending motions, it is for the reasons stated in the accompanying Memorandum Opinion, this 27th day of July, 2010
ORDERED
1. Plaintiffs' First Motion for Preliminary Injunction [Paper No.4] is MOOT;
2. Plaintiffs' Renewed Motion for Preliminary Injunction [Paper No. 40] is DENIED;
3. Plaintiffs' Motion to Amend/Correct Amended Complaint [Paper No. 42] is DENIED IN PART and DEFERRED IN PART. The Motion is DENIED as to President Obama. The Motion is DEFERRED as to proposed additional Defendants Pelosi, Hoyer and Clyburn. Subject to reasonable extensions as may be granted by the Court, Plaintiffs areDIRECTED to serve these Defendants with a copy of the Second Amended Complaint and the Motion to Amend within 30 days. Proposed Defendants Pelosi, Hoyer, and Clyburn shall have 20 days after service to file an opposition to Plaintiffs' Motion to Amend;

4. Plaintiffs' Motion to Deem Opposition to Plaintiffs' Motion to Amend Waived [Paper No. 52] is **DENIED;** and
5. Plaintiffs' Motion for Reconsideration [Paper No. 54] is **DENIED;**

Peter J. Messitte

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
C.A. No. 8:10-CV-00017-PJM

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA,; M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD USCINSKI, M.D.,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendant

PLAINTIFFS' NOTICE OF DISMISSAL OF PROPOSED SECOND AMENDED COMPLAINT

Plaintiffs Daniel G. Anderson, William Colliton, M.D., Richard P. Delaney, M.D., Gaetano Molinari, M.D., Richard Loria, M.D., Lorenzo Marcolin, M.D., James Ronan, M.D., Edward Sheridan, M.D., Edward Soma, M.D., and Ronald Uscinski, M.D., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismiss all causes of action in the proposed Second Amended Complaint asserted against defendants Speaker

of the House of Representatives Nancy Pelosi, Majority Leader of the House of Representatives Steny Hoyer, and Majority Whip of the House of Representatives James Clyburn without prejudice.

Plaintiffs are dismissing their proposed action against the House Leadership because there is no longer a basis for obtaining the injunctive relief originally sought by Plaintiffs against the House Leadership when they filed their Motion to Amend/Correct Amended Complaint on March 18, 2010 [Paper No. 42]. Once the Patient Protection and Affordable Care Act was passed by the House on March 21, 2010, Plaintiffs' causes of action in the proposed Second Amended Complaint for injunctive relief against the House Leadership became moot.

Pelosi, Hoyer and Clyburn have neither filed an answer to the proposed Second Amended Complaint nor a motion for summary judgment as to the causes of action asserted therein against the House Leadership. Dismissal under Rule 41(a)(1) is therefore appropriate.

Respectfully submitted,

/s/_____

R. Martin Palmer
Law Offices of Martin Palmer
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info@martinpalmer.com
Attorney for Plaintiffs

Dated: August 10, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.
Plaintiffs,

v. Civil No. **PJM 10-17**

BARACK OBAMA, in his official capacity as President of the United States
Defendant.

ORDER

Upon consideration of Plaintiffs' Notice of Dismissal of Proposed Second Amended Complaint [Paper No. 58], it is, this 10th day of August, 2010 **ORDERED**

1. Plaintiffs' Notice of Dismissal of Proposed Second Amended Complaint [Paper No. 58] is **APPROVED**;
2. The Clerk of the Court is directed to **CLOSE** this case.

/s/_____
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

Article. I.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article. I.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof* [Modified by Amendment XVII], for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; *and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.*

Article. I.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.,
Plaintiffs

v.

BARACK OBAMA,
Defendant

PJM 10-CV-0017

SUPPLEMENTAL AFFIDAVIT

STATE OF MARYLAND, COUNTY OF WASHINGTON, to-wit:

COMES NOW, RICHARD P. DELANEY, M.D., and makes affidavit as follows:

The sitting Congress of the United States, both houses, has made a mockery of the Origination Clause of our heretofore beloved Constitution. It may, if you like, now be despised and shuffled like a deck of cards in the hands of some poker shill who deals to himself any hand he wants. Has it now become "A tale told by an idiot (our patriots) — full of sound and fury; signifying nothing?" Not many of our countrymen are aware that the title of the ObamaCare legislation does not in the slightest degree refer to medical care. "Resolved, that the bill of the House of Representatives (**H.R. 3590**) **"An Act to amend the Internal Revenue Code of 1986 . . . etc . . . do pass with the following AMENDMENTS: Strike out all after the enacting clause and insert."** What was then **inserted** was the entire ObamaCare bill exclusively argued and passed in the Senate only. Every word, comma, jot and tittle was included: nothing was omitted, and the dealer had a royal flush.

The first patient that I encountered in practice over fifty years ago was a twelve-year-old boy who had been bitten by a copperhead. The last one treated was a ninety-four-year-old man seen in the office last night. He is almost completely blind, but his mind is brighter than sunlit show. He has been a patient almost all of those wonderful years, and I have seen his doctor through myriad illnesses. I suppose he has been treated by every type of specialist in the Physician Directory, but through it all, it has been my privilege to be his "doctor." Last night's visit was a little prolonged as we reminisced a bit and I had to promise not to retire. The point is that I have had a long and intimate experience with the doctor-patient bond. This deeply personal covenant is indispensable to the practice of medicine. It is in fact the essence, the heartbeat of medicine.

Government control will end all of that. The funding, the restrictions, the scheduling, the documentation, the rationing, the delays, the endless government intrusions will certainly change the face of American medicine. Fewer doctors will be seeing more patients. It is already difficult to accept Medicare patients. On July 1st of this year the Medicare reimbursement for doctors is to be decreased by 21%, thus necessarily rationing medicine. Logically, with less, a doctor can do less. Yet the significance of this pales in comparison to the five hundred billion dollars that ObamaCare plans to take out of Medicare while covering thirty million additional patients.

Mine has been a particularly graced life. Between the snake-bitten boy and the blind old man it has been a stage on which was played a dozen human dramas daily, and if I have been able to help a bit, I'm grateful to God for the chance. That's the role of the doctor but only in the context of the doctor-patient relationship. ObamaCare is a bastard bill sneaking out of a dark closet on (of all

nights) Christmas Eve. It is the fruit of chicanery and makes a shard of our Constitution. It is thus a matter of urgency that our bill of complaint be adjudicated promptly.

/s/_____

Richard P. Delaney, M.D.

State of Maryland
County of Washington

Subscribed and sworn to before me this 19th day of May, 2010, at Hagerstown, Maryland.

/s/_____
Notary Public

My Commission Expires:

4/21/12

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.,

Plaintiffs

v.

BARACK OBAMA,

Defendant

Case No. 8:10-CV-0017

AFFIDAVIT

STATE OF MARYLAND, COUNTY OF WASHINGTON, to-wit:

COMES NOW, RONALD USCINKSI, M.D., and makes affidavit as follows:

As a clinical neurosurgeon with nearly four decades of experience, I have witnessed many changes in medicine. I can say with absolute certainty that there are no changes as large or as devastating to the profession or to patients as the recently enacted health-care legislation from our Congress, signed into law by the President. The Hippocratic Oath taken by myself and by generations of my physician forebears has lasted through history for one simple reason, this being that it works. It defines the doctor/patient relationship. It is part of our culture, not as Americans, not as western civilization, but as members of the human race. Once again, for emphasis, it works.

I have no doubt whatsoever that this legislation, no matter how cleverly crafted or adamantly enforced, will eventually fail. Doctor do what they do for the benefit of their patients, and quite simply, ultimately they are going to answer to their patients and not the state, laws

notwithstanding. Hence, these laws will fail, as they have for thousands of years. The real tragedy is what we professionals as physicians and our patients are going to have to endure before the proposed system collapses under its own weight of impossibility. Doctors cannot and ultimately will not serve two masters — their patients and their government. We saw the first glimmerings of this dilemma with the advent of third party medicine via insurance companies, and it is now coming to full bloom.

As a clinical professor of neurosurgery, I have been involved with neurosurgical education for over 30 years. This has afforded me the opportunity to watch and participate in the training of young neurosurgeons, a group of highly motivated, supremely skilled individuals who voluntarily and happily put in close to a decade of training after medical school before they begin their actual careers, and begin these careers with a level of training and skill I dare say exceeds that of any politician at the beginning of their own career. As recently as today, I interacted with neurosurgical trainees in two separate academic programs. Those nearing completion of their training have honed their skills and judgment in and out of the operating room to an astonishing level of competence, a level that would be the envy of any other profession. And yet, after all this training, and for the first time ever, I have witnessed their real uncertainty about their future and the future of their profession. With this legislation the restrictions upon the ability of a physician, particularly one as skilled as a neurosurgeon, to exercise comprehensive and sober clinical judgment in a high-risk setting is compromised to a hitherto unheard of degree. They (we) are even cautioned as to what extent and even how to prepare a patient's head to undergo surgery, and having researched the guidelines instigating such cautions myself, it is clear that the majority of such guidelines are made by non-neurosurgeons and probably

non-physicians. This is not good patient care and furthermore in the long run is a most unwise expenditure of time, resources, and taxpayer money.

Once again, this will fail. But we will pay a heavy and bitter price before the promulgators of this sea change learn. Pity.

/s/_____
Ronald Uscinksi, M.D.

STATE OF MARYLAND; COUNTY OF WASHINGTON

Subscribed and sworn to before me this 19th day of May, 2010, at Hagerstown, Maryland.

/s/_____
Notary Public

My Commission Expires:

4/21/12

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.	)	
	)	
	)	
Plaintiffs	)	
	)	Case No. 8:10-CV-0017
v.	)	
	)	
BARACK OBAMA,	)	
	)	
Defendant	)	

AFFIDAVIT

STATE OF MARYLAND, COUNTY OF WASHINGTON, to-wit:

COMES NOW, JENNIFER R. BOYER, and makes affidavit as follows:

I am 24 years old. I have spent countless hours in high school and college preparing myself for the challenge of medical school and a career as a physician. I wanted to become a doctor so I could counsel and treat patients on a professional level, with the hope that every once in a while I could change, improve and even save people's lives.

I received an offer of admittance to medical school in the spring of 2009. I deferred my acceptance and have spent almost a year analyzing the cost of my dream against the benefit. The average medical school student will acquire nearly $200,000 in debt over four years of rigorous coursework. Additionally, medical students willingly trade four years of their young lives for the vast knowledge required to effectively treat patients.

Until this past year, I would have gladly taken on the debt and the workload necessary to fulfill my dream because the relationships that doctors develop with their patients over an entire career are invaluable. But—Obama's health care plan will make doctors nothing more than a name on a list of providers. The level of care doctors are able to provide will be limited to the allowed services on government-funded health insurance plans.

At this point, I ask myself, "Why should I take on the debt, make the personal sacrifices, and spend the time to become a physician? I will most likely end up as a subordinate, catering to someone else's ideas." Honestly, in this political climate, I think it makes more sense to become a Physician's Assistant. I could still see patients and impact lives, but I can reach that point in less than half the time with less than half the debt and only a fraction of the headaches.

Obama's decision to tackle health care reform so quickly and with so little thought to the future of America's doctors is taking away many of the incentives that drive bright, young students to pursue a career in medicine. Such a decision should not be made lightly because it could have a drastic impact on the future of medicine.

/s/_____
Jennifer R. Boyer

STATE OF MARYLAND; COUNTY OF WASHINGTON

Subscribed and sworn to before me this 17th day of March, 2010, at Hagerstown, Maryland.

/s/_____
Notary Public

My Commission Expires:

4/21/12

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD UCINSKI, M.D.,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendant.

C.A. No. 8:10-CV-00017-PJM

RENEWED MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs hereby move pursuant to Federal Rule of Civil Procedure 65(b) for the issuance of a preliminary injunction enjoining and restraining the Defendant President from signing any health care reform bill that originated in the Senate that is then passed by the House of Representatives and presented to President for his signature, or from signing any health care reform bill that is passed by the House of Representatives pursuant to a House rule that "deems" the bill to have been passed

without a direct vote on the bill being taken by the members of the House of Representatives, or, in the alternative, enjoining the enforcement and implementation of any such health care reform bill after it is signed by the President. The Court should grant the preliminary injunction for the reasons set forth in the accompanying memorandum of law.

/s/_____

R. Martin Palmer

Date Filed: March 18, 2010

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD UCINSKI, M.D.,

Plaintiffs,

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BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendant.

C.A. No. 8:10-CV-00017-PJM

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs, by and through undersigned counsel, hereby submit this memorandum of law in support of their Motion for Preliminary Injunction.

STATEMENT OF FACTS

The Patient Protection and Affordable Care Act (H.R. 3590), hereinafter the Senate Bill, is a Senate health care reform bill that was introduced on the floor of the Senate on November 18, 2009, and therefore originated in the Senate. On December 21, 2009, the Senate voted to cut off all further debate on the Senate Bill by a vote of 60 to 40, thereby ending a Republican filibuster of the Senate Bill. On December 24, 2009, the Senate voted to pass the bill by a vote of 60 to 39, with only Jim Bunning (R-KY) failing to vote.

On January 19, 2010, in a special election held in the State of Massachusetts, Scott Brown (R MA) was elected to the Senate, ending the Democrats' 60-member, filibuster-proof majority in the Senate. As a result, the House Democratic leadership has decided to undertake to pass the Senate Bill through the House of Representatives, instead of attempting to conference with the Senate on a compromise or reconciled bill that would then be passed by both houses of Congress before being presented to the President for his signature, even though (a) the Senate Bill was initiated in the Senate and (b) the Senate Bill contains several provisions imposing new taxes and increasing existing taxes.

In addition, the House Democratic leadership is actively considering securing the passage of the Senate Bill through the House of Representatives through a House rules procedure commonly known as "Deem and Pass" or the "Slaughter Rule", whereby no direct vote will be taken by the members of the House of Representatives on the Senate Bill. Instead the members of the House of Representatives will vote directly on a companion or "sidecar" reconciliation bill of amendments to the Senate Bill and the Senate Bill will then be "deemed" to have passed the House of Representatives.

On information and belief, a vote in the House of Representatives on the Senate Bill, and/or a vote in the House of Representatives on the companion reconciliation measure that will be "deemed" to have resulted in the passage by the House of the Senate Bill, has been scheduled for as early as Saturday, March 20, 2010.

ARGUMENT

I. Plaintiffs Have Shown That They Are Likely To Succeed On The Merits.

The purpose of preliminary equitable relief is "to preserve the status quo pending the outcome of litigation." *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006), *cert. denied,* 549 U.S. 1317 (2007), quoting *Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969). To obtain a preliminary injunction, the moving party must show (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council,* 129 S. Ct. 365, 374 (2008); *Real Truth About Obama, Inc. v. FEC,* 575 F.3d 342, 346-347 (4th Cir. 2009). The plaintiff bears the burden of showing that each of these factors supports granting the injunction. *Direx Israel, Ltd. v. Breakthrough Med. Corp.,* 952 F.2d 802, 812 (4th Cir. 1991).

As will be shown below, Plaintiffs meet the first factor as they are likely to succeed on the merits.

A. Passage by the House of the Senate Bill Violates the Origination Clause.

The Origination Clause mandates that "[a]ll bills for raising Revenue shall originate in the House of Representatives." U.S. Const., Art. I, § 7, cl. 1; see *United States v. Munoz-Flores,* 495 U.S. 385, 387 (1990). As the Supreme Court elaborated in Munoz-Flores,

> In the case of "Bills for raising Revenue," § 7 requires that they originate in the House before they can be properly passed by the two Houses and presented to the President. The Origination Clause is no less a requirement than the rest of [Section 7] because 'it does not specify what consequences follow from an improper origination,' post, at 402. None of the Constitution's commands explicitly sets out a remedy for its violation. Nevertheless, the principle that the courts will strike down a law when Congress has passed it in violation of such a command has been well settled for almost two centuries. See, e.g., Marbury v. Madison, 1 Cranch 137, 176-180 (1803). That principle applies whether or not the constitutional provision expressly describes the effects that follow from its violation.

495 U.S. at 396-397.

The bill in question, moreover, is one for "raising Revenue." Thus, the Senate Bill raises revenue through the imposition of taxes, fees, and limits on deductions, including, but not limited to, a tax on cosmetic surgery,

higher payroll taxes on top earners, a tax on high end, "luxury" health insurance plans, the imposition of fees on health insurance companies, the imposition of fees on drug manufacturers, the imposition of fees on the manufacturers of medical devices, the setting of a higher floor for deducting medical expenses, and the imposition of a cap on flexible health spending accounts. Furthermore, the health care subsidies and programs financed by these taxes will benefit groups of citizens who are "entirely unrelated to the persons paying for the program[s]." See *United States v. Munoz-Florez,* 495 U.S. at 400 n. 7 (not reaching question "[w]hether a bill would be 'for raising Revenue' where the connection between payor and program was more attenuated . . .").

Secondly, the bill in question, The Patient Protection and Affordable Care Act (H.R. 3590), hereinafter "the Senate Bill," is a Senate health care reform bill that was initiated in the Senate by being introduced on the floor of the Senate on November 18, 2009. Consequently, passage of this revenue-raising bill by the House of Representatives fails to meet the requirements of the Origination Clause and would render any resulting law subject to being struck down as null and void.

B. Deeming the Senate Bill Passed by the House Violates the Requirements of Article I, Section 7.

Article I, Section 7 of the Constitution that, in order for a bill to "become a law," the exact same bill with the exact same text must be approved by both the House and the Senate before the that text is presented to the President to be signed. See U.S. Const. Art. I, § 7; *Clinton v. City of New York,* 524 U.S. 417, 448 (1998).

On information and belief, the House Rules Committee, under the chairmanship of Louise Slaughter (D NY) is in the process of crafting a rule that will "deem" the Senate Bill to have passed, even though it will not be voted on

directly by the members of the House, which rule is known as "Deem and Pass" or the "Slaughter Rule." Specifically, the members of the House will vote on a companion or "sidecar" bill that contains a package of amendments to the Senate Bill, and pursuant to the newly crafted House rule the Senate Bill will be "deemed" to have passed with the approval of the companion measure.

Voting on a companion reconciliation or sidecar bill, containing a package of amendments to the Senate Bill, which vote is then "deemed" by a House rule to constitute passage of the Senate Bill itself, is not a vote on the exact same bill and the exact same text as the bill that the Senate voted on, and would violate the requirements of Article I, Section 7 of the Constitution for when a bill can "become a law."

In sum, Plaintiffs are likely to succeed on the merits of the constitutional claims that passage by the House of the Senate Bill will result in a bill that violates the Origination Clause and/or cannot "become a law" for failure to meet the requirements of Article I, Section 7 of the Constitution.

II. Plaintiffs Will Likely Be Irreparably Harmed Absent Issuance Of A Preliminary Injunction.

A plaintiff must make a "clear showing" of a likelihood irreparable harm because the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d at 812. The required irreparable harm must be neither remote nor speculative but actual and imminent. *Id.*

"Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), p*et. for cert.*

filed Nov. 2, 2009 (Sup. Ct.) (No. 09-530) , citing *Monterey Mechanic Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir. 1997) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm."); *see also Preston v. Thompson,* 589 F.2d 300, 303 n. 3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy would certainly serve the public interest."). Plaintiffs have alleged in their proposed Second Amended Complaint that passage by the House of the Senate Bill will violate the Origination Clause and/or the requirements of Article I, Section 7 of the Constitution. These constitutional violations cannot be adequately remedied through awards of monetary damages.

Furthermore, Plaintiff physicians will further be irreparably harmed if the requested preliminary injunction does not issue. As Drs. Delaney and Ucinsky have summarized in their affidavits attached to the proposed Second Amended Complaint, passage, enforcement, and implementation of the Senate bill would have a severe detrimental effect on the doctors' practice of medicine, on the health and well being of their patients, and on the nature of the unique physician-patient relationship, injuries that by their very nature cannot be remedied through an award of money damages.

Finally, the irreparable harm is actual and imminent. A vote in the House of Representatives on the Senate Bill, and/or a vote in the House of Representatives on the companion reconciliation measure that will be "deemed" to have resulted in the passage by the House of the Senate Bill pursuant to the "Slaughter Rule", has been scheduled for as early as Saturday, March 20, 2010.

In short, Plaintiffs have made a clear showing that they are likely to suffer irreparable harm absent issuance of a preliminary injunction.

III. The Balance of Equities Tips in Favor of Issuing the Requested Preliminary Injunction.

The balance of equities tips decidedly in favor of the Plaintiffs. The likelihood of irreparable harm if a preliminary injunction does not issue is very great, since the unconstitutional passage of the Senate Bill by the House of Representatives cannot be adequately remedied by an award of monetary damages. If a preliminary injunction does not issue, the President will be free to sign, enforce and implement the resulting health care reform bill presented to him after its unconstitutional passage by the House.

On the other hand, issuance of a preliminary injunction will result in little or no harm to the President. The preliminary injunction simply restrains the President from engaging in coercive actions that exceed his powers under the Constitution and improperly infringe upon the exclusive legislative powers of Congress. The President will remain free to fully exercise his constitutional powers of recommending legislation and to veto and threaten to veto legislation.

Thus, the likelihood of irreparable harm to Plaintiffs far outweighs the harm, if any, to the President.

IV. The Public Interest Favors Issuance of the Requested Preliminary Injunction.

The Fourth Circuit has recognized that, "upholding constitutional rights serves the public interest." *Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). The Seventh Circuit has likewise recognized that remedying constitutional violations "certainly serve the public interest." *Preston v. Thompson*, 589 F.2d at 303 n. 3.

In this case, issuance of a preliminary injunction to prevent the President from continuing to use and abuse

his executive powers to obtain control over the exercise of legislative power by the Congress, through the coercion of its members, would certainly serve the public interest. Preservation of the principle of separation of powers is necessary to prevent the exercise of tyranny to the grave detriment of the citizenry of the United States.

CONCLUSION

As Plaintiffs have demonstrated all four elements for the issuance of a preliminary injunction, Plaintiffs espectfully request that their motion for a preliminary injunction be granted, and that an Order be entered temporarily restraining the President from signing any health care reform bill that originated in the Senate that is then passed by the House of Representatives and presented to President for his signature, or from signing any health care reform bill that is passed by the House of Representatives pursuant to a House rule that "deems" the bill to have been passed without a direct vote on the bill being taken by the members of the House of Representatives, or, in the alternative, enjoining the enforcement and implementation of any such health care reform bill after it is signed by the President.

Respectfully submitted,

_____

R. Martin Palmer

Date Filed: March 18, 2010

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DANIEL G. ANDERSON; WILLIAM: COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD UCINSKI, M.D.,

Plaintiffs,

v. C.A. No. 8:10-CV-00017-PJM

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,
Defendant.

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs hereby move pursuant to Fed. R. Civ. P. 15(a) for leave to file the attached proposed Second Amended Complaint. The Motion is supported by the attached Memorandum of Law. Counsel for Defendant has been contacted and has indicated that they will oppose the Motion.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DANIEL G. ANDERSON; JENNIFER R. BOYER; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD UCINSKI, M.D.,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States; NANCY PELOSI, in her official capacity as Speaker of the House of Representatives; STENY HOYER, in his official capacity as Majority Leader of the House of Representatives; and JAMES E. CLYBURN, in his official capacity as the Majority Whip of the House of Representatives,

Defendants.

C.A. No. 8:10-CV-00017-PJM

SECOND AMENDED COMPLAINT

Plaintiffs, by way of complaint against the Defendants, allege the following:

NATURE OF ACTION

1. This is an action for declaratory, injunctive and other necessary and appropriate relief, brought under the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.,

seeking (1) a declaratory judgment that the actions of the Defendant, President Barack Obama, and the members of his White House staff in intimidating and coercing Senator Ben Nelson of Nebraska to vote in favor of the Senate health care reform bill known as the Patient Protection and Affordable Care Act (H.R. 3590), and/or to vote in favor of a measure to cut off all further debate on such bill, by threatening to take executive actions detrimental to the citizens of Nebraska are (a) ultra vires acts in excess of the powers of the President, (b) an usurpation, absorption and use of constitutional legislative powers confided exclusively to Congress in violation of the doctrine of separation of powers, and (c) render any resulting reconciled or merged health care reform bill presented by Congress to the President null and void as a product of such ultra vires and unconstitutional acts; (2) the entry of an injunction directing and ordering Defendant President Obama to cease and desist from undertaking in the future to intimidate and coerce any member of the Congress to vote in favor of any health care bill, including the bill to be reported out of the House-Senate Conference, and/or to vote in favor of cutting off debate on any such bill by making threats to take executive action or actions that adversely affect the member's constituents, or, in the alternative, enjoining the enforcement of any resulting reconciled or merged health care reform bill that is presented by Congress to the President and that is signed by the President; (3) a declaratory judgment that the actions of the Defendants Nancy Pelosi, Steny Hoyer, and James E. Clyburn in attempting to pass and/or in obtaining the passage through the House of Representatives of a health care reform bill initiated in the Senate that raises revenues through the imposition of several new taxes and the increase in several existing taxes violates Article I, Section 7 of the United States Constitution; (4) a declaratory judgment that the actions of the Defendants

Nancy Pelosi, Steny Hoyer, and James E. Clyburn in attempting to pass and/or in obtaining the passage through the House of Representatives of the Senate health care reform bill without a direct vote by the members of the House on that bill, through a rules procedure known as "Deem and Pass" or the "Slaughter Rule", violates Article I, Section 7 of the United States Constitution; and (5) the entry of an injunction restraining Defendant President Obama from signing any health care reform bill that is passed by the House in violation of Article I, Section 7 of the United States Constitution and/or enjoining the enforcement of any such health care reform bill.

PARTIES

2. Plaintiff Daniel G. Anderson, a citizen of Maryland and a federal taxpayer who resides in Chevy Chase, Maryland, and who holds a degree in economics from Yale University, is a former officer in the U.S. Navy and veteran of the Korean War, and is now retired.

3. Plaintiff Jennifer R. Boyer, a citizen and resident of Washington, D.C. and a federal taxpayer, is a graduate of the University of Kentucky and has been admitted to the University of Kentucky's medical school.

4. Plaintiff William Colliton, M.D., a citizen of Maryland and a federal taxpayer, who resides in Bethesda, Maryland, is currently a Clinical Professor of Obstetrics and Gynecology at George Washington University Medical Center in Washington, D.C.

5. Plaintiff Richard P. Delaney, M.D., is a citizen of Maryland and a federal taxpayer, who resides in Silver Spring, Maryland, and is currently a General Practitioner with an active family practice of over fifty (50) years.

6. Plaintiff Richard Loria, M.D., is a citizen of

Virginia and a federal taxpayer who resides in McLean, Virginia, whose medical specialty is Allergy and Immunology, and who currently works as a lecturer to the medical profession.

7. Plaintiff Lorenzo Marcolin, M.D., is a citizen of Maryland and a federal taxpayer who resides in Potomac, Maryland, and is an orthopedic physician.

8. Plaintiff Gaetano Molinari, M.D., is a citizen of Maryland and a federal taxpayer who resides in Chevy Chase, Maryland, and is currently a Neurologist and the Chairman Emeritus of the Department of Neurology at George Washington University in Washington, D.C.

9. Plaintiff James Ronan, M.D., is a citizen of Maryland and a federal taxpayer who resides in Potomac, Maryland, and is a cardiologist and the author of cardiology textbooks that are used in the medical profession.

10. Plaintiff Edward Sheridan, M.D., a citizen and resident of Washington, D.C. and a federal taxpayer, is a psychiatrist and the former Chairman of the Department of Psychiatry at Georgetown University.

11. Plaintiff Edward Soma, M.D., is a citizen of Maryland and a federal taxpayer who resides in Kensington, Maryland, and is a radiologist, the Founding Chairman of the Department of Radiology and Nuclear Medicine of Holy Cross Hospital, and the former Chairman of the Board of the St. Jude's Hospital in Memphis, Tennessee.

12. Plaintiff Ronald Ucinski, M.D., is a citizen of Virginia and a federal taxpayer who resides in Great Falls, Virginia, is a neurosurgeon and a graduate of the Georgetown University School of Medicine, a Senior Surgeon with the U.S. Public Health Service, and an Assistant Professor in the Department of Neurological Surgery, Georgetown University and George Washington

University.

13. Defendant Barack Hussein Obama is the President of the United States.

14. Defendant Nancy Pelosi (D CA) is the Speaker of the House of Representatives.

15. Defendant Steny Hoyer (D MD) is the Majority Leader of the House of Representatives.

16. Defendant James E. Clyburn (D SC) is the Majority Whip of the House of Representatives.

JURISDICTION AND VENUE

17. Jurisdiction over this action is conferred by the federal question jurisdiction statute, 28 U.S.C. § 1331.

18. Venue is properly laid in this Court by virtue of 28 U.S.C. §

1391(b).

FACTUAL BACKGROUND

19. The Patient Protection and Affordable Care Act (H.R. 3590), hereinafter the Senate Bill, is a Senate health care reform bill that was initiated in the Senate by being introduced on the floor of the Senate on November 18, 2009.

20. On December 21, 2009, the Senate voted to cut off all further debate on the Senate Bill by a vote of 60 to 40, thereby ending a Republican filibuster of the Senate Bill.

21. On December 24, 2009, the Senate voted to pass the bill by a vote of 60 to 39, with only Jim Bunning (R-KY) failing to vote.

22. On information and belief, in December 2009

prior to the aforementioned Senate votes, Defendant President Barack Obama and/or members of his White House Staff met in closed-door sessions with Senator Ben Nelson (D-NE) on several occasions.

23. On information and belief, during one or more of these closed-door meetings, Defendant President Obama and/or members of the White House staff with the knowledge and approval of the President, threatened to put Offutt Air Force Base on the Base Realignment and Closure (BRAC) list, thus slating the base for closure, unless Senator Nelson voted in favor of the Senate Bill and/or voted in favor of cutting off all further debate on the Senate Bill.

24. Offutt Air Force Base employs approximately 10,000 military and federal employees in Southeastern Nebraska and it is the headquarters of the Strategic Command (STRATCOM), the successor to the Strategic Air Command.

25. On information and belief, a Senate aide to Senator Ben Nelson stated that the threat to place Offutt Air Force Base on the BRAC list was "a naked effort by Rahm Emanuel and the White House to extort Nelson's vote" and that the White House was "threatening to close a base vital to national security for what?"

26. On January 19, 2010, in a special election held in the State of Massachusetts, Scott Brown (R MA) was elected to the Senate, ending the Democrats' 60-member, filibuster-proof majority in the Senate.

27. As a result, the House Democratic leadership has decided to undertake to pass the Senate Bill through the House of Representatives, instead of attempting to conference with the Senate on a compromise or reconciled bill that would then be passed by both houses of Congress before being presented to the President for his signature, even though (a) the Senate Bill was initiated in the

Senate and (b) the Senate Bill contains several provisions imposing new taxes and increasing existing taxes.

28. In addition, the House Democratic leadership is actively considering securing the passage of the Senate Bill through the House of Representatives through a rules procedure commonly known as "Deem and Pass" or the "Slaughter Rule", whereby no direct vote will be taken by the members of the House of Representatives on the Senate Bill. Instead the members of the House of Representatives will vote directly on a companion or "sidecar" reconciliation bill of amendments to the Senate Bill and the Senate Bill will then be "deemed" to have passed the House of Representatives.

29. On information and belief, a vote in the House of Representatives on the Senate Bill, and/or a vote in the House of Representatives on the companion reconciliation measure that will be "deemed" to have resulted in the passage by the House of the Senate Bill, has been scheduled for as early as Saturday, March 20, 2010.

COUNT I - ULTRA VIRES CONDUCT

30. Plaintiffs hereby incorporate the allegations of Paragraphs 1 through 29 of their Complaint as if fully set forth herein at length.

31. Article II of the United States Constitution provides in part that "[t]he executive Power shall be vested in a President . . ."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

32. Article II, Section 3 of the Constitution further requires that the President "from time to time give to the Congress Information of the State

of the Union, and recommend to their Consideration such

Measures as he shall judge necessary and expedient." Subsumed within this Article II, Section 3 directive is a requirement not to foment division between the States.

33. The President also has a constitutional veto power. Specifically, after a bill has passed both Houses of Congress, but "before it becomes a Law," the bill must be presented to the President. If he approves, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the objections at large on their Journal, and shall proceed to reconsider it." U.S. Const., Art. I, § 7, cl. 2. The President's "return" of a bill, which is commonly described as a veto, can be overridden by a two-thirds vote in each house.

34. In the framework of the Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.

35. The Constitution limits the President's functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.

36. The Constitution is neither silent nor equivocal about who shall make laws that the President is to execute: Article I of the Constitution provides that, "All legislative powers herein granted shall be vested in a Congress of the United States . . . ," and further provides that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

37. The Constitution does not subject this exclusive lawmaking power of Congress to presidential supervision or control.

38. The President admittedly can help shape legislation

prior to its presentment to him for signature. Through statements of administration policy, staff and presidential discussions with members of Congress wherein the views of the President and the arguments in favor of those views are made known to such members, and public statements, the President can influence legislation.

39. In addition, the President, pursuant to his Article I power to veto legislation, may prior to presentment threaten to veto legislation that contains what he considers to be unconstitutional provisions, or provisions that he objects to on policy grounds, and may thereby convince or coerce Congress to remove those provisions.

40. Aside from his authority to issue veto threats, however, the President cannot, prior to presentment, use a threat to exercise an otherwise legitimate executive power, confided to him under Article II of the Constitution, to intimidate or coerce individual members of the House of Representatives, or to intimidate or coerce individual members of the Senate, in the exercise of their exclusive constitutional authority to make laws, without improperly exceeding his authority under the Constitution and thereby acting ultra vires.

41. Decisions as to whether or not to vote for a particular bill, or whether or not to vote to cut off debate on a bill, are exclusively legislative decisions for the members of Congress to make, and therefore it constitutes a breach of trust and an abuse of the power confided in the President for the President to attempt to impose his views on the members of Congress that a particular bill should become law, or that debate on a particular bill should be cut off, through coercion or intimidation of individual members of Congress, including by threatening to take executive action that adversely affects a member's House District or State unless that member votes in favor of a particular bill.

42. On information and belief, in or about December 2009 President Obama and/or one or more of the members of his White House Staff acting with his knowledge and approval, during one or more closed-door meetings, threatened a member of the United States Senate, namely Senator Ben Nelson of Nebraska, that the President would take action to shut down the Strategic Command base currently located within the State of Nebraska, with an attendant loss of thousands of jobs and millions of dollars of revenue to that State, unless Senator Nelson voted in favor of passage of the Senate Bill and/or voted in favor of a measure to cut off all debate on the Senate Bill.

43. In threatening to take executive action adverse to the State of Nebraska unless Senator Nelson voted in favor of passage of the Senate Bill, the President abused his authority and acted in excess of his powers under the Constitution.

44. The Senate subsequently, on December 21, 2009, passed a measure to cut off debate on the Senate health care reform bill by a vote of 60 to 40. Senator Nelson voted in favor of this measure.

45. Thereafter, on December 24, 2009, the Senate voted to pass the Senate health care bill by a vote of 60 to 39. Senator Nelson voted in favor of passage of the bill.

46. On February 25, 2010, President Obama held a so-called "health care summit" at the White House, during which he went beyond his limited constitutional powers to participate in the legislative process as specified by Article I, Section 7 and Article II, Section 3 of the Constitution, by seeking directly to negotiate a health care measure with members of Congress as if President Obama and Vice President Joseph Biden were part of the legislative branch.

47. Article I, Section 7 of the Constitution limits the President's participation in the legislative process to a

veto after a bill has been passed, and precludes the President from participating in the legislative process leading up to the passage of a bill, which he sought to do at the health care summit.

48. On information and belief, there is an imminent danger that the President will again engage in ultra vires acts of threatening one or more members of the House of Representatives with executive action adverse to their constituents unless those members vote in favor of the Senate Bill and/or the companion/sidecar "reconciliation" bill setting forth certain amendments to the Senate Bill.

49. The Declaratory Judgment Act authorizes this Court, "[i]n a case of actual controversy within its jurisdiction, . . . [to] declare the rights and other legal relations of any interested party seeking such declaration," and to grant "[f]urther necessary or proper relief" based on such declaratory judgment, see 28 U.S.C. §§ 2201, 2202.

50. The plaintiffs, including the plaintiff physicians, are "interested parties" as they will be adversely affected in the practice of their profession by the final passage of the Senate Bill and its presentation to the President for his signature, regardless of whether or not the companion reconciliation bill is subsequently passed by the Senate.

51. Plaintiff Richard P. Delaney, M.D., in his affidavit attached hereto as Exhibit "A", has summarized the adverse effects that would result from the passage and signing into law of the Senate Bill, as follows:

a. Such passage will cause "the loss of the practice of medicine as we have known it";

b. Such passage "will eliminate that sacred binding of the dedicated physician and the sick patient";

c. Such passage "will certainly insure that doctors who can retire will do so quickly, and they will remain retired";

d. Such passage will force sick patients "into an impersonal system" that does not know the patients' names and is "operated by clock-watching civil servants";

e. Such passage will force sick patients to wait for treatment, with such waiting "extending to months or even years";

f. Such passage will mean that fewer young students will opt to go to medical school "merely to become a government functionary";

g. Such passage will "deny[] free citizens access to the medical of their own choosing"; and

h. Such passage will "force physicians to practice medicine deficiently."

52. Plaintiff Ronald Ucinski, M.D., in his affidavit attached hereto as Exhibit "B", has summarized the adverse effects that would result to his clinical practice, and to his patients' health, as follows:

a. Such passage would impose "additional layers of personnel who are to be involved with [medical care] decision making," involving "further delay, unnecessary effort, paperwork, and reduced efficiency, and ultimately, paralysis";

b. Such passage will mean that patients "are going to become more ill and even die while waiting for treatment, as has happened in every country that has adopted such a system";

c. Such passage will make it more difficult for Dr. Ucinski to keep his clinical practice "in the black";

d. Such passage will "drive away the very practitioners [of medicine] who have made health care in the United States the eminent system it has become and replace medical practice with medical processing"; and

e. Such passage will cause the country's "more capable citizens" to "seek medical care elsewhere [than the United States], as [users of] other socialized systems have indeed sought care here, before the advent of this prospective program."

53. Plaintiff Jennifer R. Boyer, in her affidavit attached hereto as Exhibit "C", states that she received an offer of admittance to medical school in the spring of 2009, that she deferred her acceptance and has spent almost a year "analyzing the cost of my dream [of becoming a doctor] against the benefit," and that she "would have gladly taken on the debt [of the cost of attending medical school] and the workload necessary to fulfill my dream because the relationships that doctors develop with their patients over an entire career are invaluable." In view of the prospective passage of President Obama's health care plan, however, Plaintiff Boyer believes that doctors will become "nothing more than a name on a list of providers," that "[t]he level of care doctors are able to provide will be limited to the allowed services on government-funded health insurance plans," and that she therefore thinks that it "makes more sense to become a Physician's Assistant."

54. Plaintiffs will also be adversely affected by the many unconstitutional provisions that are in the Senate Bill and likely will remain regardless of whether or not the amendments set forth in the companion reconciliation bill are passed by the Senate and signed into law by the President. A summary of three of the more glaring constitutional defects in the bills can be found in a recent Op-Ed piece in the Wall Street Journal, authored by Senator Orrin Hatch (R-Utah), Kenneth Blackwell, a senior fellow with the Family Research Council, and Kenneth A. Klukowski, a fellow and senior legal analyst with the American Civil Rights Union. (Wall Street Journal, Op-Ed Pages, January 2, 2010.)

WHEREFORE, Plaintiffs pray for the entry of judgment against the Defendant President Barack Hussein Obama

(A.) Declaring that the actions of the President and the members of his White House staff in intimidating and coercing Senator Ben Nelson to vote in favor of the Senate Bill and/or to vote in favor of cutting off further debate of the Senate Bill by threatening to take executive actions detrimental to the citizens of Nebraska are ultra vires acts in excess of the powers of the President;

(B.) Declaring that the actions of the President in holding a health care summit at the White House during which he sought to negotiate a health care measure with members of Congress as if he and the Vice President were part of the legislative branch are ultra vires acts in excess of the powers of the President;

(C.) Declaring any resulting health care reform bill presented by Congress to the President to be null and void as a product of such ultra vires and unconstitutional acts;

(D.) Enjoining the President and the members of his White House staff, including all agents and employees of the President and the White House staff, from undertaking in the future to intimidate and coerce any member of the Congress to vote in favor of any health care bill, including the Senate Bill, or to vote in favor of cutting off further debate on any such bill, by making threats to take executive action or actions that adversely affect the member's constituents;

(E.) Enjoining the enforcement of any resulting health care bill that is presented by Congress to the President and is signed by the President; and

(F.) For such additional and further relief as may be just or equitable.

COUNT II - VIOLATION OF SEPARATION OF POWERS

56. Plaintiffs hereby incorporate the allegations of Paragraphs 1 through 55 of their Complaint as if fully set forth herein at length.

57. The principle of separation of powers, although not expressed in the Constitution in so many words, underlies and undergirds it.

58. As Mr. Justice Brandeis once wrote, "[t]he doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting).

59. In Federalist No. 47, James Madison observed that, "*There can be no liberty where the legislative and executive powers are united in the same person* or body of magistrates . . .. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law . . .." (Emphasis added.)

60. In 1792, Thomas Jefferson related how he told President George Washington that "if the equilibrium of the three great bodies, Legislative, Executive and Judiciary, could be preserved, if the Legislature could be kept independent, I should never fear the result of such a government; but that *I could not but be uneasy when I saw that the Executive had swallowed up the Legislative branch.*"

61. In his concurring opinion in *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579, 629, 633 (1952), Justice Douglas observed: "The tragedy of such stalemates might be

avoided by allowing the President use of some legislative authority. *The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement. . . .* Such a step would most assuredly alter the pattern of the Constitution."

62. A President cannot use or abuse his constitutional executive powers as leverage to gain control over the exercise of the constitutional legislative powers of Congress without improperly blending executive and legislative power and concentrating such dual power in the Executive branch, in violation of the doctrine of separation of powers.

63. President Obama, by using or abusing his executive powers to coerce an individual member of the Senate to vote in favor of the Senate Bill and/or to vote in favor of cutting off all further debate on the Senate Bill and, by this action, implicitly sending a message that he is prepared, if necessary, to engage in further coercion of members of Congress to pass the reconciled health care reform bill that will be reported out of the House-Senate conference committee, has sought to usurp, absorb, gain control over and/or use the exclusive legislative authority of Congress in violation of the doctrine of separation of powers.

64. To avoid the Executive from swallowing up the Legislative branch, the President must be restrained from engaging in the use or abuse of his executive powers to coerce individual members of Congress to vote in favor of any health care reform bill that the President favors, or in favor of cutting off debate on any health care reform bill that the President favors.

WHEREFORE, Plaintiffs pray for the entry of judgment against the Defendant President Barack Hussein Obama

Declaring that the actions of the President and the members of his White House staff in intimidating and

coercing Senator Ben Nelson to vote in favor of the Senate Bill and/or to vote in favor of cutting off further debate on the Senate Bill by threatening to take executive actions detrimental to the citizens of Nebraska unconstitutionally have usurped, swallowed and absorbed the powers of the Legislative branch of the Government in violation of the doctrine of the separation of powers;

Declaring any resulting health care reform bill presented by Congress to the President to be null and void as a product of such ultra vires and unconstitutional acts;

Enjoining the President and the members of his White House staff, including all agents and employees of the President and the White House staff, from undertaking in the future to intimidate and coerce any member of the Congress to vote in favor of any health care bill, including the Senate Bill, or to cut off debate on any such bill by making threats to take executive action or actions that adversely affect the member's constituents;

Enjoining the enforcement and implementation of any resulting health care reform bill that is presented by Congress to the President and is signed by the President; and

For such additional and further relief as may be just or equitable.

COUNT III - VIOLATION OF ORIGINATION CLAUSE

65. Plaintiffs hereby incorporate the allegations of Paragraphs 1 through 64 of their Complaint as if fully set forth herein at length.

66. Article I, Section 7, Clause 1 of the Constitution, the Origination Clause, states specifically that "[a]ll Bills for raising revenue shall originate in the

House; but the Senate may propose or concur with Amendments as on other Bills."

67. The Origination Clause incorporates the principle of "No taxation without representation."

68. Because the Senate is not representative of the people, but of the States, the Origination Clause requires that revenue raising bills must originate in the House of Representatives, which is representative of the people in order to ensure that the "no taxation without representation" principle is followed in the legislative process.

69. The Senate Bill that is now before the House of Representatives is not an amendment to the House Bill, but is rather a bill that originated in the Senate.

70. The Senate Bill is a revenue raising measure, in that it raises revenue through the imposition of taxes, fees, and limits on deductions, including, but not limited to, a tax on cosmetic surgery, higher payroll taxes on top earners, a tax on high end, "luxury" health insurance plans, the imposition of fees on health insurance companies, the imposition of fees on drug manufacturers, the imposition of fees on the manufacturers of medical devices, the setting of a higher floor for deducting medical expenses, and the imposition of a cap on flexible health spending accounts.

71. If the House of Representatives passes the Senate Bill before the reconciliation process is begun, then the House will be passing a revenue raising bill that originated in the Senate and not in the House, in violation of Article I, Section 7, Clause 1 of the United States Constitution.

72. If, on the other hand, the House of Representatives begins the reconciliation process first, involving the passage by the House of a package of amendments to the Senate Bill, in order to claim that the

health care bill "originated" in the House, such action would constitute a ruse or subterfuge to avoid the mandate of Article I, Section 7, Clause 1 that all revenue raising bills must originate in the House.

73. The reconciliation process cannot initiate the passage of the Senate Bill in the House, since the Senate Bill has already been initiated in the Senate.

74. A re-initiation of the Senate Bill in the House of Representatives does not satisfy the mandate of the Origination Clause.

WHEREFORE, Plaintiffs pray for the entry of judgment against the Defendants

(A.) Declaring that passage of the Senate Bill by the House of Representatives constitutes the passage of a revenue raising bill originating in the Senate in violation of Article I, Section 7, Clause 1 of the United States Constitution;

(B.) Declaring the Senate Bill, if passed by the House of Representatives and/or signed into law by the President, null and void as passed in violation of Article I, Section 7, Clause 1 of the United States Constitution; and

(C.) Enjoining the President from signing the Senate Bill upon it being passed by the House of Representatives and presented to President for his signature; and

(D.) Enjoining the enforcement and implementation of any resulting health care reform bill that is presented by Congress to the President and is signed by the President; and

(E.) For such additional and further relief as may be just or equitable.

COUNT IV – VOTE ON SAME BILL AS SENATE

75. Plaintiffs hereby incorporate the allegations of Paragraphs 1 through 74 of their Complaint as if fully set forth herein at length.

76. Even assuming a reconciliation process begun by the House Budget Committee of the House of Representatives constitutes the initiation of the Senate Bill and its revenue raising measures in the House as required by the Origination Clause, such an initiation would require the House to avoid voting on the Senate Bill.

77. On information and belief, the House Rules Committee, under the chairmanship of Louise Slaughter (D NY) is in the process of crafting a rule that will "deem" the Senate Bill to have passed, even though it will not be voted on directly by the members of the House, which rule is known as "Deem and Pass" or the "Slaughter Rule."

78. Passage of the Senate Bill by the House without the members of the House voting directly on the Senate Bill would violate Article I, Section 7 of the Constitution, which requires that before a bill can "become a law," the House and Senate must vote on the exact same bill that contains the exact same text.

79. Voting on a companion reconciliation bill, containing a package of amendments to the Senate Bill, which is then deemed by a House rule to constitute passage of the Senate Bill itself, is not a vote on the exact same bill and the exact same text as the bill that the Senate voted on, and would violate the requirements of Article I, Section 7 of the Constitution for when a bill can "become a law."

WHEREFORE, Plaintiffs pray for the entry of judgment against the Defendants

(A.) Declaring that passage of the Senate Bill by the House of Representatives without the members of the House voting directly on the Senate Bill violates Article I, Section 7 of the United States Constitution;

(B.) Declaring the Senate Bill, if passed by the House of Representatives pursuant to the "Deem and Pass" or "Slaughter Rule" so that the members of the House do not vote directly on the Senate Bill, is null and void as passed in violation of the requirements prescribed by Article I, Section 7;

(C.) Enjoining the President from signing the Senate Bill upon it being passed by the House of Representatives pursuant to "Deem and Pass" or the "Slaughter Rule" and presented to President for his signature;

(D.) Enjoining the enforcement and implementation of any resulting health care reform bill that is presented by Congress to the President and is signed by the President; and

(E.) For such additional and further relief as may be just or equitable.

_____

R. Martin Palmer

Date Filed: March 18, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.,

Plaintiffs

v.

BARACK OBAMA,

Defendant

Civil Case No.8:10-CV-0017

AFFIDAVIT

STATE OF MARYLAND, COUNTY OF WASHINGTON, to-wit:

COMES NOW, RICHARD P. DELANEY, M.D., and makes affidavit as follows:

Diogenese would be distressed in today's America. His claim was that virtue is the only good and that all else can be good only within the context of virtue. The story runs that he searched in vain for the honest man. That was Athens two thousand years ago. Should he roam the halls of our Capitol today with his legendary lamp, it would not penetrate the murk of the locked door, bribery strewn, shady deals destroying American medicine as our doctors have known and practiced it these many years. They are destroying, in fact, a way of life; literally. There are many paths to the concentration of power in a centralized government. The present Administration and Congressional majority seems to be trying them all. The socialization of medicine is probably

the most efficient tool in achieving that lamentable end. I deplore the loss of the practice of medicine as we have known it and the harm that socialized medicine will do to my patients.

We are now engaged in a clatter of debates resulting, I believe, from the atrophy of our social fiber. Perhaps the most glaring, the most dangerous debate involves that unavoidable problem, that eventuality which intrudes on our lives in the best and worst of times. I speak of the burden of sickness. It is a question of how and why a sick person seeks out his trusted physician when sickness visits uninvited. Sickness is intensely personal. It shrinks from statistics and generalities. When you are sick or have a reason to think that you are, there comes about a type of isolation, a derailment of a sort. You have a need to get your life back on the right track. You seek the help of the doctor who knows you. You trust him to know what to do; when and how to do it. If it is beyond his ability, you can trust him to find the needed specialty care. The tendency to refer to a doctor as "my doctor" is an expression of that personal trust. He knows you, and you can be sure that he has your best interests behind his decisions. The bond between the patient and the physician has been bound by sacred oath for over two thousand years. The oath of Hippocrates still applies, and the patient rightly expects no less.

Ordinarily, as in the case of an acute not so serious illness, the path to wellness may be an easy one. The sore throat or bruised knee is easily diagnosed, treated and just as easily forgotten. It may be, though, that the illness is chronic as in diabetes or high blood pressure. The path then to a normal life involves altering some habits, taking needed drugs and periodic monitoring. Personal life then proceeds basically unaltered. However the diagnosis may also be of an incurable illness with a prognosis of the patient dying within a certain period of time. It is here

that the physician who has known us in our acute and chronic illnesses has come to have an awareness of our family, friends and way of being. It is precisely here that "my doctor" is best able to come to my aid and see me through . . . whatever the circumstances. This is said, and needs to be said, to point out that the doctor-patient relationship carries with it an incalculable value and responsibility. It is a value not to be denied without doing grave injustice. Strangely, that bond between the doctor and the sick person is barely mentioned in the thousands of unexamined pages of "medical reform." Yet it is here exactly that the art and science of medicine meets and is made present to the person who needs it now. Think about that.

In my life of medical practice extending over half a century, I have never experienced a situation in which a patient was denied treatment because of poverty. A typical expression to the specialist when referring such a patient might have been: "You will have to do this one for the glory of God." I have never had a refusal. Hospitals have also extended the proverbial helping hand with needed rate reductions or complete elimination of fees. For the mere asking, my own hospital has accepted carte blanche several patients even imported from poor foreign countries specifically for diagnosis and treatment. No question of payment was ever raised. It cannot have been a unique occurrence. Physician friends, some of whom have retired, continue regular schedules, dedicating their impressive skills (completely on a voluntary basis) to caring for the poor. They have maintained their licenses specifically for this purpose. There are several such groups of doctors in our area, and I have not the slightest doubt that the practice is repeated across the nation. Such is the bond of a doctor and patient, and such is the dedication of the American doctor to his art and its practice.

The multiple so-called "medical reform" plans coming out of Congress have nothing in the slightest to do with American medicine except to insure its demise while concentrating power in a centralized federal government. Without doubt, it will eliminate that sacred binding of the dedicated physician and the sick patient. It will certainly insure that doctors who can retire will do so as quickly as possible, and they will remain retired. The sick patient will be forced into an impersonal system. It will be a system that knows not his name and is operated by clock-watching civil servants. You will take your turn and wait your turn with your waiting extending to months or even years. That onerous system is plainly to be seen all over the world where socialized medicine is practiced. The evidence is clear. You have only to examine it. I need not boast of the quality of medicine practiced in our America. It speaks volumes for itself, and we are justified in being proud of it. It will be missed.

There are worlds more to learn about this art than when I went to medical school a half century (and then some) ago. The learning tree is higher, and it is correspondingly harder to climb. Fewer young students will be motivated to make that climb merely to become a government functionary. They will be asked to become the tool of a plan or an amalgam of plans that our elected representatives passed without even bothering to read. It is a plan passed with the urging of twisted arms, pork barrel handouts and odious bribes. It is a plan deviously enacted in midnight sessions that could not stand the light of day. The budding physician will look forward to a career as a system functionary beholden to a civil service regime more interested in the concentration of power into its own hands than in the helping of the sick. If there is anyone who believes that this socialized structure is designed to attract and encourage bright young Americans to embrace the rigors of medical education, I marvel at his credulity.

Since socialization of medicine has nothing to do with medicine and everything to do with socialism and the concentration of power in the state, better it might be to go to law school and try to get elected to Congress.

Yes, we have indeed changed in many ways. It must be so. Yet, there are facets of culture that are embedded in truth and must not change. They provide the framework for our code of morality necessary for our continued adherence to life, liberty and the pursuit of happiness.

We physicians question deeply that the framers of our Constitution had any thought of denying free citizens access to the legitimate medical care of their own choosing.

We deny that Congress is privileged to force physicians to practice medicine deficiently as would be mandated by currently proposed health care plans.

We deny that this usurpation of power and denial of freedom is embedded in any way in our Constitution.

We hereby beg that the constitutionality of government imposition into medicine be affirmed or denied by our unelected judiciary before being signed into law.

/s/_____
Richard P. Delaney, M.D.

State of Maryland
County of Washington

Subscribed and sworn to before me this 4th day of January, 2010, at Hagerstown, Maryland.

/s/_____
Notary Public

My Commission Expires:
4/21/12

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.,

Plaintiffs

v.

BARACK OBAMA,

Defendant

PJM 10-CV-0017

SUPPLEMENTAL AFFIDAVIT

STATE OF MARYLAND, COUNTY OF WASHINGTON, to-wit:

COMES NOW, RICHARD P. DELANEY, M.D., and makes affidavit as follows:

We are more privileged, more blessed a state than we can know. Should we allow the culture of socialism to have its sway, we will have handed over a way of life based on true freedom — freedom of soul, mind and heart. Handed it over for what? Chains! This is neither hyperbole nor dramatization for effect. If we permit a centralized government to control a patient's freedom to choose his physician and to control the physician's freedom to choose the most beneficial treatment for that patient, another onerous link will have been forged. What then might not be mandated by the state? The government's lawyers claim that I have no "standing." In this single manifestation of the destruction of that traditional deep bond (the doctor/patient relationship) existing between me and my sick patient, I see freedom being stolen from us; the

trust that my patient places in my hands violated by bureaucracy. That bureaucracy takes no responsibility for the outcome and has no compassion for the pain and worry that illness brings. I am forced to **practice my art deficiently** but am told that I have no **standing** to say so. There are examples of many such invasions into the interplay between the sick, anxious patient and the concerned, compassionate physician apparent throughout this medical care catastrophe dubbed "Heath Care Reform."

To say that I have no standing calls to mind a tragic cartoon. The doctor is tied hand and foot to the railroad track while the juggernaut train bears down on him at ram speed. Yet the doctor may not petition the engineer to stop. After all, tied down as he is, he has no standing. Who are they who render this negative judgment on "standing?" What have they studied of anatomy, physiology, inorganic and organic chemistry, biochemistry, pathology, pharmacology, psychology, psychiatry and all other subjects which form merely the pre-education of the aspiring doctor? The physician's clinical education, by far the most taxing, is yet to come. The clinical training, in fact, never ends. It has been well said (Sir William Osler) that medicine is learned at the patient's bedside. It is a truth that no doctor, however long his practice, however eminent his station, can ever afford to neglect. It is a truth that certainly will be forgotten should the President and Congress force their brand of medicine on the rest of us. "Standing" refers to personal impact by or involvement in some particular affair. My profession, my vocation, my business, my very identity is deeply involved in and defined by the practice of medicine. It will be permanently disrupted by any of the various medical plans concocted behind closed doors and supported through bribery and blackmail. I have attached some of these invasions as an addendum to this statement. Please

review the cases cited in the addendum. They are a sample of but a few of the instances in which the government is trying to capture the practice of medicine to aggrandize power to itself. It is not true to say that I have no standing in opposing this. That train is heading my way.

/s/_____

Richard P. Delaney, M.D.

State of Maryland

County of Washington

Subscribed and sworn to before me this 17th day of March, 2010, at Hagerstown, Maryland.

/s/Melanie L. Port

Notary Public

My Commission Expires:

04/21/2012

HEALTH CARE BILL

There follows a summary of some of the provisions found in just the first 498 pages of the health care bill. This summary was put together by Dr. Stephen Fraser of Indianapolis, Indiana, an anesthesiologist, and sent to Richard P. Delaney, M.D., one of the Plaintiffs in *Anderson, et al. vs. Obama*, U.S. District Court for the District of Maryland, Greenbelt Division, Case No. 10-CV-0017.

Dr. Delaney is taking Dr. Fraser's word for the summary of the provisions and has added (in parenthesis in italics) his comments of how this health care bill will affect his medical patients and his practice:

Beginning at Page 22:

Page 22 mandates that the government will audit books of all employers that self-insure!!

Page 30, Section 123: THERE WILL BE A GOVERNMENT COMMITTEE that decides treatment/benefits you get. ***(Directly interferes.)***

Page 29, lines 4-16: YOUR HEALTH CARE IS RATIONED!! ***(Rations health care — directly affects me and my patients.)***

Page 42: The Health Choices Commissioner will choose your HC benefits for you. You have no choice! ***(Direct interference.)***

Page 50, Section 152: Health care will be provided to ALL non-US citizens, illegal or otherwise.

Page 58: Government will have real-time access to individual's finances and a National ID Health card will be issued (Papers please!) ***(Strong effect on all medical practices.)***

Page 59, lines 21-24: Government will have direct access to your bank accounts for elective funds transfer.

Page 65, Section 164 is a pay off subsidized plan for retirees and their families in unions and community organizations.

Page 84, Section 203: Government mandates ALL benefit packages for private health care plans in the "Exchange." ***(Direct interference.)***

Page 85, line 7: Specifications of benefits levels for plans — the government will ration your health care! ***(Direct interference.)***

Page 91, lines 4-7: Government mandates linguistic appropriate services.

Page 95, lines 8-16 HC Bill: The government will use groups (i.e. ACORN and Americorps) to sign up individuals for government HC plan.

Page 85, line 7: Specifications of benefits levels for plans (AARP members, your health care WILL be rationed.) ***(Direct interference.)***

Page 102, lines 12-18: Medicaid eligible individuals will be automatically enrolled in Medicaid (no choice). ***(Affects all medical practices.)***

Page 124, lines 24-25: No company can sue government on price fixing. No "judicial review" against government monopoly.

Page 12, lines 1-16: Doctors/American Medical Association, the government will tell YOU what salary you can make. ***(This is to me a form of slavery.)***

Page 145, line 15-17: An employer MUST auto-enroll employees into public option plan (no choice).

Page 126, lines 22-25: Employers MUST pay for health care for part-time employees AND their families. (Employees shouldn't get excited about this as employers will be forced to reduce its workforce, benefits, and wages/salaries to cover such a huge expense.)

Page 149, lines 16-24: ANY employer with payroll $401k and above who does not provide public option will pay 8% tax on all payroll. (See the last comment in parentheses.)

Page 150, lines 9-13: A business with payroll between $251k and $401k who doesn't provide public option will pay 2-6% tax on all payroll.

Page 167, lines 18-23: ANY individual who doesn't have acceptable health care according to government will be taxed 2.5% of income.

Page 170, lines 103: Any NON-RESIDENT alien is exempt from individual taxes. (Americans will pay.) (Like always.) ***(This will have the affect of overloading office schedules and hurt everybody.)***

Page 195: Officers and employees of the GOVERNMENT health care administration will have access to ALL Americans' finances and personal records. (I guess so they can 'deduct' their fees.) ***(This ruins patient confidentiality.)***

Page 203, lines 14-15: "The tax imposed under this section shall not be treated as tax." (Yes, it really says that!) (a fee instead)

Page 239, line 14-24: Government will reduce physician services for Medicaid seniors. (Low income and poor are affected.) ***(Directly interferes.)***

Page 241, lines 6-8: Doctors, it doesn't matter what specialty you have trained yourself in, you will all be paid the same. (Just TRY to tell me that's not Socialism!) ***(More slavery.)***

Page 253, lines 10-18: The government sets the value of a doctor's time, profession, judgment, etc. (Literally, the value of humans.) ***(Direct interference.)***

Page 265, Section 1131: The government mandates and controls productivity for "private" health care industries. ***(More slavery.)***

Page 268, Section 1141: The federal government regulates the rental and purchase of power-driven wheelchairs. ***(Direct interference; my hemiplegic patient cannot get a wheelchair, etc.)***

Page 272, Section 1145: TREATMENT OF CERTAIN CANCERS - Cancer patients, welcome to rationing! ***(Direct interference.)***

Page 280, Section 1151: The government will penalize hospitals for whatever the government deems preventable (i.e. readmissions). ***(Direct interference and threats.)***

Page 298, lines 9-11: Doctors: If you treat a patient during initial admission that results in a readmission, the government will penalize you! ***(Direct interference and threats.)***

Page 317, lines 13-20: PROHIBITION on ownership/investment. (The government tells doctors what and how much they can own!) ***(Direct interference and more slavery.)***

Page 317-318, lines 21-25, 1-3: PROHIBITION on expansion. (The government is mandating that hospitals cannot expand.) ***(Direct interference.)***

Page 321, lines 2-13: Hospitals have the opportunity to apply for exception BUT community input is required. (Can you say ACORN?) ***(Direct interference.)***

Page 335, lines 16-25, pages 336-339: The government mandates establishment of two outcome-based measures. (Health care the way they want — rationing.) ***(Direct interference.)***

Page 341, lines 3-9: The government has authority to disqualify Medicare Advance Plans, HMO's, etc. (forcing people into the government plan). ***(May force current patients out of my office.)***

Page 354, Section 1177: The government will RESTRICT enrollment of 'special needs' people! Unbelievable! ***(Truly unbelievable interference; some of these wonderful people are my patients.)***

Page 379, Section 1191: The government creates more bureaucracy via a "Tele-Health Advisory Committee." (Can you say health care by phone?) ***(Scary and interferes.)***

Page 425, lines 4-12: The government mandates "Advance-Care Planning Consult. (Think senior citizen end-of-life patients.) ***(Scary and interferes.)***

Page 425, lines 17-19: The government will instruct you and consult regarding living wills, durable powers of attorney, etc. (And it's mandatory!) ***(Scary and interferes in a big way.)***

Page 425, lines 22-25, 426, lines 1-3: The government provides an "approved" list of end-of-life resources guiding you in death. (Also called 'assisted suicide.') (Sounds like Soylent Green to me.) ***(Scary and interferes in a big way.)***

Page 427, lines 15-24: The government mandates a program for orders on "end of life." (The government has a say in how your life ends!) ***(Scary and interferes in a big way.)***

Page 429, lines 10-12: An "advanced care consultation" may include an ORDER for end-of-life plans . . . (AN ORDER TO DIE FROM THE GOVERNMENT?!) ***(Scary and interferes in a big way.)***

Page 429, lines 13-25: The government will specify which doctors can write an end-of-life order. (I wouldn't want to stand before God after getting paid for THAT job!) ***(Scary and interferes in a big way.)***

Page 430, lines 11-15: The government will decide what level of treatment you will have at end of life! (Again, no choice!) ***(Scary and interferes in a big way.)***

Page 469: Community-Based Home Medical Services - Non-Profit Organizations (Hello? ACORN Medical Services here!?!)

Page 489, Section 1308: The government will cover marriage and family therapy. (Which means government will insert itself into your marriage even.) ***(Scary and interferes in a big way.)***

Page 494-498: Government will cover mental health services including defining, creating and rationing those services. ***(Scary and interferes in a big way.)***

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.,	)	
	)	
	)	
Plaintiffs	)	
	)	Case No. 8:10-CV-0017
v.	)	
	)	
BARACK OBAMA,	)	
	)	
Defendant	)	

AFFIDAVIT

DISTRICT OF COLUMBIA:SS

COMES NOW, RONALD USCINKSI, M.D., and makes affidavit as follows:

I am a clinical neurosurgeon involved in the day-to-day practice of my craft. There is no question that the Obama health care legislation will impact negatively on my clinical practice and the practice of just about every physician I know, our patients' health, and quite possibly their lives. With the advent of non-physicians interfacing between medical decision making and patients affected by such decisions, the introduction of a third party has already resulted in a form of economic rationing for my patients. Certain health plans will not pay for certain procedures, drugs, or treatments and have reduced the amount of time they will reimburse for postoperative hos-

pitalization, and from here on the front lines, patients are put at some risk with too-early hospital discharges. I see this often. So patients therefore even today, with our current system, have limits on their choices.

The imposition of an even larger bureaucracy, by simple common sense, is not streamlining. Today it is still possible for me to obtain appropriate neurodiagnostic procedures such as CT or MRI scanning with minimal delay. With the imposition of additional layers of personnel who are to be involved with such decision making, I do not see anything but further delay, unnecessary effort, paperwork, and reduced efficiency, and ultimately, paralysis. Quite simply, people are going to become more ill and even die while waiting for treatment, as has happened in every country that has adopted such a system. Although such delay is little seen at present in our system, the seeds are there, and I do not see this legislation speeding up the process. As we know already, costs continue to rise for the patient and reimbursement continues to decline for the doctor. The money is not going to the provider of service, but to the burgeoning intermediaries between the doctor and the patient. Would you designate more intermediaries? You will reduce overall unemployment perhaps, but only at the expense of medical productivity and perhaps patients' health. There was no unemployment in the former Soviet Union, but little actual work got done, and they were unable to compete with us.

As far as I and my colleagues' ability to continue under such a system, basically it's a simple question of common sense. If reimbursement for services provided is reduced yet the cost of running a practice increases through such factors as general office overhead, liability insurance, and even filling my car with gasoline to make hospital rounds, not to mention personal expenses such as groceries, household utilities including energy, and, of

course, tax increases, one is led inevitably to a point at which a physician such as myself simply cannot work hard enough and care for enough patients to keep my practice in the black. There are not enough hours in the day, and as a conscientious practitioner of medicine, one cannot cut corners. After watching my own career, not one of my children has even considered a career in medicine. You will drive away the very practitioners who have made health care in the United States the eminent system it has become and replace medical practice with medical processing. I would predict our more capable citizens will seek medical care elsewhere, as other socialized systems have indeed sought care here, before the advent of this prospective program.

/s/_____

Ronald Uscinksi, M.D.

DISTRICT OF COLUMBIA:SS

Subscribed and sworn to before me this 15th day of March, 2010, at District of Columbia.

/s/_____

Hazel A. Waters

Notary Public

My Commission Expires:

01/14/2010

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON, et al.	)	
	)	
	)	
Plaintiffs	)	
	)	Case No. 8:10-CV-0017
v.	)	
	)	
BARACK OBAMA,	)	
	)	
Defendant	)	

AFFIDAVIT

STATE OF MARYLAND, COUNTY OF WASHINGTON, to-wit:

COMES NOW, JENNIFER R. BOYER, and makes affidavit as follows:

I am 24 years old. I have spent countless hours in high school and college preparing myself for the challenge of medical school and a career as a physician. I wanted to become a doctor so I could counsel and treat patients on a professional level, with the hope that every once in a while I could change, improve and even save people's lives.

I received an offer of admittance to medical school in the spring of 2009. I deferred my acceptance and have spent almost a year analyzing the cost of my dream against the benefit. The average medical school student will acquire nearly $200,000 in debt over four years of rigorous coursework. Additionally, medical students

willingly trade four years of their young lives for the vast knowledge required to effectively treat patients.

Until this past year, I would have gladly taken on the debt and the workload necessary to fulfill my dream because the relationships that doctors develop with their patients over an entire career are invaluable. But—Obama's health care plan will make doctors nothing more than a name on a list of providers. The level of care doctors are able to provide will be limited to the allowed services on government-funded health insurance plans.

At this point, I ask myself, "Why should I take on the debt, make the personal sacrifices, and spend the time to become a physician? I will most likely end up as a subordinate, catering to someone else's ideas." Honestly, in this political climate, I think it makes more sense to become a Physician's Assistant. I could still see patients and impact lives, but I can reach that point in less than half the time with less than half the debt and only a fraction of the headaches.

Obama's decision to tackle health care reform so quickly and with so little thought to the future of America's doctors is taking away many of the incentives that drive bright, young students to pursue a career in medicine. Such a decision should not be made lightly because it could have a drastic impact on the future of medicine.

/s/_____

Jennifer R. Boyer

STATE OF MARYLAND; COUNTY OF WASHINGTON

Subscribed and sworn to before me this 17th day of March, 2010, at Hagerstown, Maryland.

/s/_____

Notary Public

My Commission Expires:

4/21/12

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD UCINSKI, M.D.,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendant.

C.A. No. 8:10-CV-00017-PJM

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiffs by and through their counsel, R. Martin Palmer, hereby submit their Memorandum of Law in Support of the Plaintiffs' Motion for Leave to File their Second Amended Complaint.

STANDARD OF REVIEW

Leave to amend a complaint should be freely granted "when justice so requires." Fed. R. Civ. P. 15(a)(2). While the Court is given the discretion to deny the motion to amend, "that discretion is limited by the interpretation given Rule 15(a) in *Foman [v. Davis,* 371 U.S. 178 (1962)], 'and by the general policy embodied in the Federal Rules favoring resolution of cases on their merits.'" *Island Creek Coal Co. v. Lake Shore, Inc.,* 832 F.2d 274, 279 (4th Cir. 1987) (citation omitted). Upholding the letter and the spirit of this rule, "leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards v. City of Goldsboro,* 178 F.3d 231, 242 (4th Cir. 1999), quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (emphasis in original). A delay in bringing a proposed amendment is insufficient reason to deny leave to amend. *Edwards v. Goldsboro,* 178 F.3d at 242.

For a motion to amend to be denied for futility, the amendment must be "clearly insufficient or frivolous on its face." *Johnson v. Oroweat Foods Co.,* 785 F.2d at 510-511.

I. The Amendment Will Not Be Prejudicial To Defendant, and There Has Been No Bad Faith on the Part of the Moving Party.

There is no basis for an argument that the amendment will be prejudicial to the Defendant. While the proposed Second Amended Complaint adds new constitutional claims to this action, the addition of new theories of recovery is insufficient reason to disallow amendment. *Robinson v. GEO Licensing, L.L.C.*, 173 F. Supp. 2d 419, 426 (D. Md. 2001); *Fed. Leasing v. Amperif Corp.*, 840 F. Supp. 1068, 1072 (D. Md. 1993). While "[i]t is

true that prejudice can result where a proposed amendment raises a new legal theory . . . that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial." *Johnson v. Oroweat Foods Co.*, 785 F.2d at 510.

In the context of a motion for leave to amend, "[p]rejudice means that the non-moving party 'must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.'" *Cuffy v. Getty Ref. & Mktg. Co.*, 648 F. Supp. 802, 806 (D. Del. 1986) (citation omitted); accord, *Robinson v. GEO Licensing, L.L.C.*, 173 F. Supp. 2d at 426. As this case is in the preliminary motion stage and discovery has not yet even commenced, Defendant cannot show any such unfair disadvantage or deprivation of opportunity.

Nor is there any support for an argument that the moving parties are guilty of bad faith. The amendments in question are made entirely in good faith on the basis of rapidly moving events, including the recent and ongoing actions of the leadership of the House of Representatives in seeking to secure passage of the Senate Bill through the House of Representatives, all of which have occurred since the filing of the original and First Amended Complaints.

In short, leave to amend cannot be denied on the basis of either prejudice to the Defendant or bad faith on the part of the moving parties.

II. The New Constitutional Claims Set Forth in the Proposed Amendment Are Not Futile.

The proposed amendment is neither clearly insufficient nor frivolous on its face. The proposed Second Amended Complaint sets forth two additional consti-

tutional claims involving the same Senate Bill that is the subject of the original constitutional claims asserted against the Defendant President.

The claim set forth in Count III of the proposed Second Amended Complaint is based on the Origination Clause. The Origination Clause mandates that "[a]ll bills for raising Revenue shall originate in the House of Representatives." U.S. Const., Art. I, § 7, cl. 1; see *United States v. Munoz-Flores*, 495 U.S. 385, 387 (1990). As the Supreme Court elaborated in *Munoz-Flores*,

> In the case of "Bills for raising Revenue," § 7 requires that they originate in the House before they can be properly passed by the two Houses and presented to the President. The Origination Clause is no less a requirement than the rest of [Section 7] because 'it does not specify what consequences follow from an improper origination,' post, at 402. None of the Constitution's commands explicitly sets out a remedy for its violation. Nevertheless, the principle that the courts will strike down a law when Congress has passed it in violation of such a command has been well settled for almost two centuries. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 176-180 (1803). That principle applies whether or not the constitutional provision expressly describes the effects that follow from its violation.

495 U.S. at 396-397.

The bill in question, moreover, is one for "raising Revenue." Thus, the Senate Bill raises revenue through the imposition of taxes, fees, and limits on deductions, including, but not limited to, a tax on cosmetic surgery, higher payroll taxes on top earners, a tax on high end, "luxury" health insurance plans, the imposition of fees on health insurance companies, the imposition of fees on drug manufacturers, the imposition of fees on the manufacturers of medical devices, the setting of a higher floor for deducting medical expenses, and the imposition of a cap on flexible health spending accounts. Furthermore, the health care subsidies and programs financed by these taxes will benefit groups of citizens who are "entirely unrelated to the persons paying for the program[s]." *See United States v. Munoz-Florez*, 495 U.S. at 400 n. 7 (not reaching question "[w]hether a bill would be 'for raising Revenue' where the connection between payor and program was more attenuated . . .").

Secondly, the bill in question, The Patient Protection and Affordable Care Act (H.R. 3590), hereinafter "the Senate Bill," is a Senate health care reform bill that was initiated in the Senate by being introduced on the floor of the Senate on November 18, 2009. Consequently, passage of this revenue-raising bill by the House of Representatives fails to meet the requirements of the Origination Clause and would render any resulting law subject to being struck down as null and void.

The claim set forth in Count IV of the proposed Second Amended Complaint is based on the requirement of Article I, Section 7 of the Constitution that, in order for a bill to "become a law," the exact same bill with the exact same text must be approved by both the House and the Senate before the that text is presented to the President to be signed. *See* U.S. Const. Art. I, § 7; *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). Voting on a companion reconciliation or sidecar bill, containing a package of

amendments to the Senate Bill, which vote is then "deemed" by a House rule to constitute passage of the Senate Bill itself, is not a vote on the exact same bill and the exact same text as the bill that the Senate voted on, and would violate the requirements of Article I, Section 7 of the Constitution for when a bill can "become a law."

In short, the new claims asserted in the proposed amendment are neither clearly insufficient nor frivolous. Thus, leave to amend should not be denied on the grounds of futility, and the substantive merits of the proposed additional claims should be left for later resolution, e.g., under motions to dismiss or for summary judgment or at trial. *See Rambus v. Infineon Techs. AG*, 304 F. Supp. 2d 812, 819 (E.D. Va. 2004).

CONCLUSION

In view of the arguments made and authorities cited above, Plaintiffs respectfully request that their Motion for Leave to File Second Amended Complaint be granted.

Respectfully submitted,

_____

R. Martin Palmer

Date Filed: March 18, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD UCINSKI, M.D.,
Plaintiffs,
v.
BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,
Defendant.

Civil Action No. 10-17
Judge Messitte

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

1. On March 18, 2010, the Court dismissed Plaintiffs' First Amended Complaint with prejudice as to President Barack Obama. On the same day, Plaintiffs moved for leave to amend their Complaint, seeking to add three defendants, all Members of Congress. Plaintiffs also seek to add one additional plaintiff, and three new affidavits addressing Plaintiffs' alleged injuries. Finally, Plaintiffs seek to add two new claims, that the Congressional procedure known as "deem and pass" violates the Bicameralism and Presentment Clause, and that the Patient Protection and Affordable Care Act violates the Origination Clause. The Court should deny Plaintiffs' motion for leave to amend their Complaint as to the

President, because all of these amendments would be futile as to Plaintiffs' claims against the President.

2. A "court should freely give leave" for plaintiffs to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a). However, a court should deny leave to amend when the "amendment would be futile." *Edwards v. City of Goldsboro,* 178 F.3d 231, 242 (4th Cir. 1999). A proposed amendment is futile if it is "clearly insufficient or frivolous on its face." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986).

3. The Court granted Defendant's Motion to Dismiss with prejudice as to President Obama, holding that Plaintiffs had alleged no legally cognizable injury, and that their claims against the President were neither redressable nor justiciable. Order Granting Motion to Dismiss, Docket No. 45. The additional claims that Plaintiffs seek to add, that the Congressional procedure known as "deem and pass" violates the Bicameralism and Presentment Clause, and that the Patient Protection and Affordable Care Act violates the Origination Clause, are not claims against the President, but rather against the Members of Congress whom Plaintiffs seek to add as defendants.[1] Plaintiffs' proposed amendments are clearly futile as to their claims against the President; adding an additional plaintiff and additional assertions of injury does nothing to make Plaintiffs' claims against the President redressable or jus-

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1 While the undersigned counsel do not represent the Members of Congress in this matter, we note for the Court that it seems likely that Plaintiffs' proposed amendment to add these Members of Congress as defendants would be futile because it appears that they would be absolutely immune from suit. U.S. Const. Art. I, § 6 ("[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place."); Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (Members of Congress are absolutely immune from suit for any actions "generally done in a session of the House by one of its members in relation to the business before it," including "the act of voting.").

ticiable. For the foregoing reasons, Plaintiffs' motion for leave to file a second amended complaint should be DENIED as to their claims against the President.

Dated: April 2, 2010

Respectfully submitted,

TONY WEST
Assistant Attorney General
ROD J. ROSENSTEIN
United States Attorney
/s/ Erika Myers
SHEILA LIEBER
Deputy Director
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Counsel for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D. JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD UCINSKI, M.D.,

Plaintiffs,

v. C.A. No. 8:10-CV-00017-PJM

BARACK HUSSEIN OBAMA, in his official capacity as President of the United,

Defendant.

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiffs, by and through their attorney undersigned, hereby file their Reply to Defendant President Obama's opposition to Plaintiffs' Motion for Leave to File their Second Amended Complaint.

ARGUMENT

I. Plaintiffs' Additional Claims Arising Under the Bicameralism Clause and the Origination Clause Are Claims Brought Against the President, As Well As Against the Members of Congress Whom Plaintiffs Seek to Add as Defendants.

Defendant erroneously asserts that the additional constitutional claims that Plaintiffs seek to add "are not claims against the President[.]" (Def. Opp., p. 2, ¶ 3.) In fact, the additional claims under Article I, § 7 are asserted against the President as well as against the Members of Congress whom the Plaintiffs seek to add as party defendants. The Second Amended Complaint seeks an injunction against the President to restrain him from either signing or enforcing and implementing any health care bill passed by the House in violation of Article I, § 7. *See* Second Amended Complaint, ¶ 1(5) (Plaintiffs seek "the entry of an injunction restraining Defendant President Obama from signing any health care reform bill that is passed by the House in violation of Article I, Section 7 of the United States Constitution and/or enjoining the enforcement of any such health care reform bill"); *id.*, Count III, Prayer for Relief, ¶¶ (C) & (D); *id.*, Count IV, Prayer for Relief, ¶¶ (C) & (D).

Indeed, now that the Senate Bill has been passed by the House (on Sunday, March 21, 2010), and presented to and signed by the President (on Tuesday, March 23, 2010), the only claims for injunctive relief that have not been mooted by events are those asserted against President Obama, seeking to enjoin him from enforcing and implementing this unconstitutional health care reform legislation (hereinafter "the Obamacare legislation") passed in violation of Article I, Section 7. Under Article II of the United States Constitution "[t]he executive Power shall be vested *in a President* . . ." and "he shall take Care that the Laws be faithfully executed." (Emphasis added.) Thus, any claim to

enjoin the enforcement and implementation of the unconstitutional health care reform bill must be brought and maintained against the Defendant President and/or subordinate executive officials, not the Members of Congress.

II. Plaintiffs' Additional Claims Against the President Are Not Futile.

Defendant contends that Plaintiffs' motion for leave to amend should be denied "because all of these amendments would be futile as to Plaintiffs' claims against the President." (Def. Opp., p.1, ¶ 1.) The additional constitutional claims asserted against the President, however, are not futile, since the are not "clearly insufficient or frivolous on [their] face." *See Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986).

A paucity of case law in any particular subject is indicative of a grievance that has rarely, if ever, arisen; and if it has arisen in the past, has gone unchallenged in the courts.

Constitutional case law, like the Constitution it serves, must always respond to uphold the immutable, foundational principles of governance laid down by the Founding Fathers. Two such principles are at work in the instant case before the court. First is the immutable principle of 'separation of powers' for which the Founding Fathers acknowledged their indebtedness to Montesquieu.1 Then in 1729, Charles-Louis de Secondat, Baron de **Montesquieu**, arrived in England. By then, he was well into his Grand Tour, studying the political systems of Italy, Germany and the Netherlands. But he was most interested in England since it was here, as **Voltaire** had suggested, liberty was at its fullest. And Montesquieu did not find himself to be disappointed. "England is at present the country in the world where there is the greatest freedom," he wrote in his *Pensees.*Seeking to understand the foundations of such freedoms, Montesquieu threw himself into British public life. He sat through interminable debates in Parliament

between Robert Walpole and his foes, mingled at the court of George II, and was elected a Fellow of the Royal Society. But what really impressed Montesquieu was English freedom. In contrast to the fearful royal absolutism of Louis XV's France, the English enjoyed the right to worship, trade and speak their minds. And this was the direct product, Montesquieu thought, of the English constitution's **separation of powers**. It was an idea he was led to appreciate by Viscount Bolingbroke, the Tory philosopher-politician. An opponent of Walpole, Bolingbroke had long accused the King and his ministers of undermining Parliament by buying off members of Parliament. (Just as Bolingbroke decried the practice of buying off members of Parliament, even so the current administration has teamed with the leadership of the Congress to buy off Senators and Congressmen with pork barrel deals and favors.) "In a constitution like ours, the safety of the whole depends upon the balance of the parts, and the balance of the parts on their mutual independency on each other." This, Montesquieu concurred, was the key to liberty. Since "every man invested with power is apt to abuse it . . . to prevent this abuse, it is necessary, from the very nature of things, powers should be a check to power." The English had achieved this by dividing up the executive, legislative and judicial function between the monarchy, Parliament and a legal system based on trial by jury and an **independent** judiciary. In theory at least, the King didn't control Parliament, and judges didn't write their own laws. While there would be areas of overlap between the three powers, if any **two** were vested in the same body (as in the French monarchy) then **liberty was at an end.** These thoughts were put together in Montesquieu's masterwork, *The Spirit of the Laws*, published anonymously in 1748 and quickly acclaimed not just in Europe but across the Atlantic and read and studied by Madison, Hamilton, Jefferson and Washington, who publicly expressed their debt to "the cel-

ebrated Montesquieu." The United States Constitution followed, imbued with Montesquieu's wisdom of separation of powers. In Britain, the **separation of powers** became part of the story of English liberty, and our forefathers, having fought the **Revolutionary War** over the principle of **NO TAXATION WITHOUT REPRESENTATION**, wrote that principle directly into the United States Constitution as Article I, Section 7, Clause 1 -- any taxing or revenue raising provision, it was mandated, **"SHALL"** originate in the House of Representatives (where elected membership was proportioned by state population). 5 Turning first to Montesquieu's principle of **separation of powers** between the executive, legislative and judicial branches of government which Madison and Hamilton and Washington and others adopted, its wisdom was to diffuse power and place a "wall of separation" between the three branches so that one branch did not come to swallow up the other branch of government. 6 Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha,* 426 U.S. 919, 951 (1983). "The declared purpose of the separating and dividing the powers of government was to '[diffuse] power the better to secure liberty.'" *Bowsher v. Synar,* 478 u.s. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring)). "Justice Jackson's words echo the famous warning of Montesquieu, quoted by James Madison in The Federalist No. 47, that '"there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates" . . .'" *Id.* (quoting The Federalist No. 47, p. 325 (J. Cooke ed., 1961)).

Supreme Court Justice Brandeis once wrote, "[t]he doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of **arbitrary** power. The purpose

was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from **autocracy**." *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 613 (Frankfurter, J., concurring), where Mr. Justice Frankfurter, in his 7concurring opinion, observed that "I know of no more impressive words on this subject than those of Mr. Justice Brandeis" in *Myers*.

The Supreme Court more recently, in an opinion by Chief Justice Burger, further recognized:

"That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, *but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.*" *Bowsher v. Synar*, 478 U.S. at 722 (emphasis added).

In 1792, Thomas Jefferson related how he told President George Washington that concentration of both legislative and executive powers in the Executive Branch was dangerous:

"I said to [President Washington] that if the equilibrium of the three great bodies, Legislative, Executive and Judiciary, could be preserved, if the Legislature could be kept independent, I should never fear the result of such a government; but that *I could not but be uneasy when I saw that the Executive had swallowed up the Legislative branch.*" Thomas Jefferson: The Anas, 1792. ME 1:318 (emphasis added).

Mr. Justice Douglas, perhaps alluding to this concern of Thomas Jefferson, observed in his concurring opinion in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 629, 633 (1952): 8 "The tragedy of such stalemates might be

avoided by allowing the President use of some legislative authority. *The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement . . . Such a step would most assuredly alter the pattern of the Constitution."* (Emphasis added.)

In the instant case, the Chief Executive, in contravention of the oath of office he took to uphold the Constitution,3 proceeded to ignore (as a former **constitutional law professor**) and skirt the **WALL OF SEPARATION BETWEEN THE EXECUTIVE AND LEGISLATIVE BRANCH OF GOVERNMENT** by overtly and contumaciously engaging in a course of conduct which ended with the imposition of the sheer force of his will upon the Congress, swallowing up the legislative branch of government, and bulldozing out of the way the wall of separation between the executive and legislative branches for the purpose of passage of his **'Obamacare.'**

Presidential Oath of Office provides: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Turning second of all to the **Connecticut Compromise** which came to be embodied in **Article I, Section 7, Clause 1 of the Constitution**. As a former constitutional law professor, Defendant Barack Obama surely was or should have been aware of what has become known as the **ORIGINATION CLAUSE**:

Article I, Section 7, Clause 1

"**All Bills for raising Revenue shall ORIGINATE in the House of Representatives;** but the Senate may propose or concur with Amendments as on other Bills."

Contrary to his oath of office to "preserve, protect and defend" the Constitution, he acted to subvert it by (when the Brown election in Massachusetts deprived him of a fil-

ibuster-proof majority in the Senate) ramming the Senate bill through the House (unconstitutionally so because it did not **ORIGINATE** in the House of Representatives, although it, in fact, imposes any number of **revenue-raising** fees and **taxes**). Defendant advocated this openly with the House leadership (none of whom were past constitutional law professors like himself) because public sentiment had turned against **'Obamacare'** and he could not follow the usual and constitutionally proper procedure of a joint House-Senate conference committee to arrive at a compromised version of '**Obamacare**' to be then introduced and voted upon in the House, followed by a vote in the Senate.

Knowing this was the only constitutionally proper path to follow, Defendant attempted on his own to hammer out such a compromise by summonsing key members of the House and Senate to his own cabinet room, immediately off of the Oval Office at the White House, with himself jockeying in and out attempting to first effect a compromise bill, which effort failed. Defendant then considered the matter jointly with the Congressional leadership for a number of days, alternating between a plan devised with the House leadership of passing it without voting on it, or voting on it (unconstitutionally because it was a Senate bill containing any number of taxing and revenue raising provisions which did not originate in the House) and putting forth a plethora of amendments to be voted on separately back in the Senate. Additionally, to win approval of his plan from Representative Bart Stupak of the House of Representatives (as instrumental to the Defendant in getting Obamacare through the House as Senator Ben Nelson of Nebraska was key and instrumental to getting Obamacare through the Senate), Defendant promised as President he would sign an Executive Order promising that no federal funds would be used for abortion. This promise was made to get Stupak to drop his objection for

a health care bill that **expands public funding for abortion**. The *Washington Post* of Wednesday, March 24, 2010, (three days after passage of the bill in the House on Sunday, March 21) put it this way in an article appearing on Page A18 of that day's *Washington Post*:

"The executive order promising that no federal funds will be used for abortion is utterly useless, and everybody knows it. First, the president can revoke it as quickly as he signs it."

"Second, an order cannot confer jurisdiction in the courts or establish any grounds for suing anybody in court, according to a former White House counsel. The order is therefore judicially unenforceable.

Finally, an executive order cannot trump or change a federal statute."

"**One can reasonably surmise that Obama, a former constitutional law professor, is well aware of the uselessness of his promise**. Perhaps this is why he didn't mention it during the bill-signing ceremony Tuesday."

". . . The only way to prevent public funding for abortion was for his amendment to be added to the Senate bill."

"Clearly, House Speaker Nancy Pelosi and the president didn't want that. What they did want was the abortion funding that the Senate bill allowed."

"Thus, the health-care bill passed because of a **mutually-understood DECEPTION -- a pretense masquerading as virtue. "**

". . . Meanwhile, whatever Americans feel about the health-care bill and its relative merits, **they should disabuse themselves of any idea that this was an honest play."**

"Ironically, the day before the vote, Obama said:

'We are not bound to win, but we are bound to be true. We are not bound to succeed, but we are bound to let whatever light we have shine.'"

"Democrats were bound to win, all right, but **TRUTH AND LIGHT HAD NOTHING TO DO WITH IT."**
. . . *Washington Post*, March 24, 2010, p. A-18
(Emphasis added.)

After the complicity of Bart Stupak was won and his vote obtained, the truth of the deception that had taken place on the part of the nation's Chief Executive was exposed by the *Post*, a paper not ordinarily emulated by conservatives. What the *Post* was reacting to was the **chicanery** that took place here. To the *Post* editors who passed on the article, the 'end did not justify the means.' They were not about to go this far in embracing the actions of this president whom they ordinarily endorse.

Bart Stupak, who lacked the sophisticated legal knowledge of the Chief Executive who deceived him, came under such a backlash from his constituents that he has since been forced to resign.

Such **DECEPTION** (word used by the *Washington Post*) could perhaps be forgiven a president who is not himself a lawyer and former very bright constitutional law professor from Harvard Law School. In the instant case, however, the deception is laid squarely at the feet of the '**DECEIVER**!' This current Chief Executive cannot be allowed to pirate and "hornswaggle" (a pirate term meaning to cheat or defraud) a law **unconstitutionally** through the Congress and then raise the same Constitution as a shield to the court's rightful power to enter up a preliminary injunction against enforcement and implementation of the law pending judicial review. He cannot say he gets to keep the law he hornswaggled and the court cannot preliminarily or permanently stop him from enforcing it.

For the court to cower under such an assertion by which the current Chief Executive would have his will with the **JUDICIAL BRANCH** as well (thereby swallowing the judicial branch up along with the legislative branch, which went down in the first gulp) is for the court to be

complicit in supplanting our constitutional Republic with the reinvention of the depotism of a king, and causing to come to power in America a world-class dictator, who having studied and mastered the constitution of his own nation, would arrogantly and defiantly rise above it on the aphrodisiac of power and self-will to the derogation of our constitutional system and disrespecting the will of the people, whose opportunity to defeat all this in the House of Representatives was derailed by the trick of ramming the Senate version through the House. The effort at a compromise bill was known to have failed by the Defendant when the meeting in his cabinet room recessed. Any attempt to reintroduce a bill in the House (where Article I, Section 7, Clause 1 commanded it to be introduced) was doomed to failure. The Defendant, acting in concert with Pelosi, et al., changed the rules, reinvented the Constitution, and hornswaggled his own will, producing an outcry among the people and their governors that echoes to this day, the damage to our constitutional system being systemic if allowed to stand. Montesquieu would stand up to this as would Washington and Hamilton and Madison and Jefferson. Supreme Court Justice Louis Brandeis would stand up to this! The court MUST AND SURELY SHALL STAND UP TO THIS.

A. Plaintiffs Have Taxpayer Standing.

First, the Second Amended Complaint alleges that the Plaintiffs are all federal taxpayers, and Plaintiffs have alleged a legally cognizable injury under the test for federal taxpayer standing set forth in *Flast v. Cohen*, 392 U.S. 83 (1968). Under that test, "taxpayers do have standing to question the constitutionality of congressional appropriations if they can demonstrate both a logical link between their status as taxpayers and the challenged legislation and a nexus between their taxpayer status and the claimed constitutional infringement." *Harrington v. Schlesinger*, 528 F.2d 425, 457 (4th Cir. 1975), citing *Flast*

v. Cohen. In this case, the Plaintiffs, as federal taxpayers, can show a logical link between their status as taxpayers and the challenged Obamacare legislation, because the additional taxes levied and the additional appropriations made by that legislation, if it is enforced and fully implemented, will inevitably increase the amount of federal taxes that each of the Plaintiffs will be required to pay in future years. In addition, the Plaintiffs can demonstrate a nexus between their taxpayer status and the claimed constitutional infringement, i.e., the violation of the Origination Clause of Article I, Section 7, since the purpose of the Origination Clause was to act as a check on Congress' power to tax and spend by ensuring that any revenue raising bill originate in the more representative body of Congress, namely the House of Representatives, rather than in the Senate.

That federal taxpayers have standing to assert Origination Clause challenges can be seen from the fact that "private taxpayers have been found to have standing to challenge the constitutionality of TEFRA [the Tax Equity and Fiscal Responsibility Act of 1982] under the Origination Clause[.]" *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 & n. 51 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), *disapproved on other grounds by Raines v. Byrd*, 521 U.S. 811 (1997), citing *Armstrong v. United States*, (S.D. Cal. Sep. 3, 1983) and *Frent v. United States*, 571 F. Supp. 739 (E.D. Mich. 1983), *appeal dism'd*, 734 F.2d 14 (6th Cir. 1984); *see also Schlick v. United States*, 1984 U.S. Dist.LEXIS 23313, *5 (N.D. Ill. Sept. 25, 1984) (No. 83 C 6335) ("The many courts which have ruled on the constitutionality of TEFRA [under the Origination Clause] have recognized private taxpayers' standing and have attempted to resolve the issue.").

B. Origination Clause Challenges Are Justiciable.

Even before 1990, "[t]he Supreme Court ha[d] implicitly held that issues under the Origination Clause are *not* nonjusticiable political questions, by the Court's adju-

dication of several challenges to revenue acts brought under the Origination Clause." *Moore v. U.S. House of Representatives*, 733 F.2d at 953 (emphasis in original), citing, by reference to earlier footnote, *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911), *overruled in part on other grounds by Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), and *Millard v. Roberts*, 202 U.S. 429 (1906).

In 1990, the Court expressly decided the question. In *United States v. Munoz-Flores*, 495 U.S. 385 (1990), the defendant, who had been convicted of a misdemeanor under federal law, received a sentencing order that imposed a special assessment pursuant to 18 U.S.C. § 3013. Section 3013 required courts to impose a special assessment on defendants convicted of federal misdemeanors. Munoz-Flores contended that § 3013 violated the Origination Clause. The United States argued that the question whether the statute violated the Origination Clause was a nonjusticiable political question.

In rejecting the nonjusticiability argument of the United States, the Court initially addressed the Government's contention that "the House's passage of a bill conclusively establishes that the House has determined either that the bill is not a revenue bill or that it originated in the House," and that therefore "a Court's invalidation of a law on Origination Clause grounds would evince a lack of respect for the House's determination." 495 U.S. at 390. In finding this contention to be without merit, the Court stated as follows:

Because Congress is bound by the Constitution, its enactment of any law is predicated at least implicitly on a judgment that the law is constitutional. . . . Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments. As we have said in rejecting a claim identical to the one

the Government makes here: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 496, 549 (1969).

Id. at 391.

The *Munoz-Flores* Court further disagreed with the Government's argument that the federal courts could not fashion "judicially manageable standards" for adjudicating whether a bill is "for raising Revenue" or where a bill "originates": "[s]urely, a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is 'excessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges." *Id.* at 396.

Thus, as *Munoz-Flores* held, a case involving an Origination Clause challenge, like the instant case, "has none of the characteristics that *Baker v. Carr*[, 369 U.S. 186 (1962)] identified as essential to a finding that a case raises a political question. It is therefore justiciable." *Id.*

C. Plaintiffs' Origination Clause Challenge Is Redressable.

It is true that there is a line of Supreme Court cases, including *Franklin v. Massachusetts*, 505 U.S. 788 (1992) and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), which "casts serious doubt as to whether courts have the power to direct or enjoin the President in the performance of his official duties."[4] *Made in*

4 As Plaintiffs pointed out at length in their opposition to the Government's motion to dismiss the First Amended Complaint, however, *there is absolutely no doubt* that this Court has the power to enjoin the President from

encroaching on the powers of the Legislative branch in order to uphold the fundamental principle of the separation of powers. *See Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) ("*There is not the slightest hint in any of the Youngstown opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party.*") (emphasis added and footnote omitted). This is a well-established exception to the general rule expressed in such cases as *Franklin* and *Mississippi v. Johnson*. *See Franklin v. Massachusetts*, 505 U.S. at 802-803 ("*in general* 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'") (emphasis added and citation omitted).

the USA Found. v. United States, 242 F.3d 1300, 1310 (11th Cir.), *cert. denied sub nom. USW v. United States*, 534 U.S. 1039 (2001). Plaintiffs contend that an exception to this general rule should be recognized where the President is acting *ultra vires* by seeking to implement and enforce legislation that is void ab initio because it was enacted in violation of the requirements of Article I, Section 7, such as the Origination Clause. Jurisdiction should be found in this case since enjoining the President's enforcement and implementation of such unconstitutional legislation "is needed to serve broad public interests." *Nixon v. Fitzgerald*, 457 U.S. at 754. Admittedly, this presents a close question.

"Nonetheless, the Government simply cannot deny the fact that there are numerous subordinate executive officials engaged in the continued operation and enforcement of [the challenged Obamacare legislation's] provisions." *See Made in the USA Found. v. United States*, 242 F.3d at 1310. Consequently, "even short of directly ordering the President to terminate [the implementation and enforcement of the challenged Obamacare leg-

islation], a judicial order instructing the subordinate executive officials to cease their compliance with its provisions [will] suffice for standing purposes." *See id.* at 1310-1311.

Furthermore, the fact that the Second Amended Complaint does not "identify subordinate [executive] officials who could be enjoined, as well as specific provisions [of the challenged Obamacare legislation] that such officials should cease to implement in order to redress [the Plaintiffs'] injuries . . . does not preclude a finding of redressability." *Id.* at 1311 n. 25. "The Supreme Court has held that a court has power under the All Writs Act, 28 U.S.C. § 1651(a), to issue commands that apply to 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.'" *Id.*, quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 172-174 (1977). Even assuming that joinder of subordinate executive officials is necessary, leave to amend should be freely granted in the interest of justice in order to achieve such joinder. *See* Fed. R. Civ. P. 15(a).

In short, the redressability requirement for standing is fully satisfied by the ability of this Court to issue injunctive relief against subordinate executive officials to halt the enforcement and implementation of the challenged Obamacare legislation. "[S]uch partial relief is sufficient for standing purposes when determining whether [the Court] can order more complete relief [against the defendant President himself] would require [the Court] to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996).

D. The Origination Clause Challenge Is Not Clearly Insufficient Or Frivolous On Its Face.

The Plaintiffs' Origination Clause challenge to the

Obamacare legislation is neither clearly insufficient nor frivolous on its face, given that the Second Amended Complaint alleges that the legislation is a revenue raising measure that originated in the Senate. Indeed, Defendant does not even address the merits of the Plaintiffs' Origination Clause claim.

In sum, given that the Plaintiffs' Origination Clause claim is both justiciable and redressable, and that Plaintiffs have federal taxpayer standing to maintain that claim, the proposed amendments set forth the Second Amended Complaint are not futile insofar as they assert additional claims against the President.**CONCLUSION**

In view of the arguments made and authorities set forth above and in their original motion, the Plaintiffs respectfully request that their motion for leave to file their proposed Second Amended Complaint be GRANTED as to their claims against the President.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D. JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD USCINSKI, M.D.,

Plaintiffs,

v. C.A. No. 8:10-CV-00017-PJM

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that DANIEL G. ANDERSON, WILLIAM COLLITON, M.D., RICHARD P. DELANEY, M.D., GAETANO MOLINARI, M.D., RICHARD LORIA, M.D., LORENZO MARCOLIN, M.D., JAMES RONAN, M.D., EDWARD SHERIDAN, M.D., EDWARD SOMA, M.D., and RONALD USCINSKI, M.D., Plaintiffs in the above named case, having filed their Notice of Dismissal of Proposed Second Amended Complaint (as to proposed defendants Nancy Pelosi, Steny Hoyer, and James E. Clyburn) under Rule 41(a)(1) of the Federal Rules of Civil Procedure on August 10, 2010 [Paper No. 58], and the District Court, by Order filed August 11, 2010, having approved such Notice of Dismissal of Proposed Second

Amended Complaint and directed the Clerk of Court to close this case [Paper No. 59], hereby appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the now final Order of the District Court dated July 27, 2010 and filed July 28, 2010 [Paper No. 57], insofar as such final Order denied Plaintiffs' Renewed Motion for Preliminary Injunction [Paper No. 40], denied Plaintiffs' Motion for Leave to File Second Amended Complaint [Paper No. 42] as to Defendant President Barack Obama, and denied Plaintiffs' Motion for Reconsideration of Order Dismissing First Amended Complaint [Paper No. 54], and Plaintiffs further give notice that they hereby also appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the Order of the District Court filed March 19, 2010 [Paper No. 45] insofar as such Order granted Defendant's Motion to Dismiss [Paper No. 31] with prejudice as to Defendant President Barack Obama.

/s/_____

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No. 10-1951

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL G. ANDERSON; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD USCINSKI, M.D.,

Plaintiffs-Appellants,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendant-Appellee.

On Appeal From an Order of the United States District Court for the District of Maryland

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APPELLANTS' MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

Appellants move for entry of an Order under Fed. R. App.P. 8(A)(2) temporarily enjoining Defendant President Obama, pending the outcome of this appeal and the issuance of the Court's mandate, from taking any further

steps to enforce or implement the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (hereinafter "the PPACA" or "the Act").

Statement of Facts

On November 7, 2009, the House of Representatives passed the Affordable Health Care for America Act, H.R. 3962, by a 220-215 vote and forwarded the bill to the Senate for passage. The Senate, however, failed to take up debate on the House bill and instead decided to originate its own health care reform bill. In an effort to circumvent the constitutional requirement that all revenue-raising bills originate in the House, the Senate took up H.R. 3590, a bill entitled "Service Members Home Ownership Tax Act of 2009," that had been introduced in the House by Charles Rangel (D-NY) on September 17, 2009 and passed by the House of Representatives on October 8, 2009 by a vote of 416-0. This bill's purpose was to amend the Internal Revenue Code "to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees, and for other purposes." H.R. 3590, a very short, noncontroversial measure had nothing to do with health care reform and did not constitute a revenue-raising bill as its primary purpose was to provide tax breaks to (, i.e., to *reduce* the taxes imposed on,) members of the uniformed services, the Foreign Service, and the intelligence community. H.R. 3590 called for a one-year extension of the first-time homebuyer $8,000 credit for service members deployed outside the United States for 90 days or longer between January 1, 2009 and December 1, 2009, and their spouses. *See* R. Maze, "House OKs Tax Breaks for Military Homeowners," AirForce Times, Oct. 8, 2009 ["Ex. A"]. H.R. 3590 did not impose taxes designed to raise revenue other than to offset the cost of providing the tax breaks.

The Senate leadership used H.R. 3590 as a "shell bill" for the Senate's health care reform measure by completely striking out all provisions of H.R. 3590 "after the enacting clause" and substituting multifarious and very lengthy amendments collectively known as Senate Amendment 2786. *See* First Page of Senate Amendment No. 2786 to H.R. 3590 ["Ex. C"]. The revised bill (hereinafter "the Senate Bill"), by now entitled the Patient Protection and Affordable Care Act ("PPACA"), was introduced on the Senate floor on November 19, 2009.

On December 21, 2009, the Senate voted 60 to 40 to cut off debate on the Senate Bill. On December 24, 2009, the Senate passed the bill by a vote of 60 to 39. All Senate Democrats and Independents voted for the bill, while all Senate Republicans (except Senator Jim Bunning (R-KY), who did not cast a vote) voted against it. On January 19, 2010, in a special election held in Massachusetts, Scott Brown (R-MA) was elected to the Senate, ending the Democrats' 60-member, filibuster-proof majority in the Senate. As a result, the House Democratic leadership undertook to pass the Senate Bill through the House of Representatives and amend it with a third bill, the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 129. The House passed the Senate Bill on March 21, 2010, by a vote of 219 to 212, with 34 Democrats and all 178 Republicans voting against it. President Obama signed the bill on March 23, 2010.

The Senate Bill, as introduced on the Senate floor, passed by the Senate and the House, and signed by the President, contains numerous new taxes, fees and penalties designed to raise revenue both to (1) offset the cost of the Senate Bill's health care insurance reforms and (2) reduce the federal deficit, including:

- **New Medicare Taxes.** Effective January 1, 2013, individuals with an adjusted gross income (AGI) of more than $200,000 a year, and married

couples with an AGI of more than $250,000 a year, will (a) have their Medicare Part A (hospital insurance) tax rate increased by 0.9 percent, to 2.35 percent, and (b) pay an entirely new tax of 3.8 percent on unearned income (e.g., interest, dividends). The JCT estimates these new Medicare taxes will bring in $210 billion between 2013 and 2019.

• **Tax on Expensive Health Insurance.** Effective January 1, 2018, an excise tax will be levied on insurers of employer-sponsored health plans that cost more than $10,200 annually for individual coverage, or more than $27,500 annually for family coverage. The tax would be 40% of the cost of any plan that exceeds these dollar thresholds. The JCT estimates this tax will bring in around $32 billion in 2018 and 2019.

• **Fees and Taxes Imposed on Health Care Industries.**

  • Drug manufacturers will pay $16 billion in new fees (2011 to 2019).

  • Health insurers will pay $47 million in new fees (2011 to 2019).

  • Effective January 1, 2013, medical device makers will pay a 2.9% excise tax on the sale of any of their wares.

• **Tanning Salon Tax.** Effective July 1, 2010, a tax of 10% will be levied on indoor tanning services. It is estimated that this tax will net approximately $2.7 million between 2010 and 2019.

• **Tax Penalties Imposed On Employers.** Effective January 1, 2014, a tax penalty of $750 per employee will be imposed on employers with over 50 employees who do not offer health insurance to their full-time workers.

• **Tax Penalties Imposed On Individuals.**

> Effective January 1, 2014, an annual tax penalty of $95, or up to 1% of income, which ever is greater, on individuals who do not secure health insurance; this will rise to an annual penalty of $695, or 2.5% of income, by 2016. The $695 figure is an individual limit on the annual penalty; families have a limit of $2085.00.

Before the Senate passed it, the Congressional Budget Office (CBO) and the JCT estimated that the Senate Bill "would yield a net reduction in federal deficits of $132 billion over the 2010-2019 period." CBO, Letter to Harry Reid, Senate Majority Leader, p. 2 (Dec. 19, 2009) ["Ex. D"]. Before the House passed the Senate Bill, the CBO and JCT similarly estimated that the bill, by itself, "would yield a net reduction in federal deficits of $118 billion over the 2010 to 2019 period, of which about $65 billion would be on-budget." CBO, Letter to Nancy Pelosi, Speaker of the House of Representatives, p. 2 (March 20, 2010) ["Ex. E"].

After initiating this action by filing their Complaint on January 5, 2010, Appellants moved for leave to amend on March 18, 2010. In Count III of their proposed Second Amended Complaint, Appellants alleged that, if the House of Representatives passed the Senate Bill, "then the House will be passing a revenue raising bill that originated in the Senate and not in the House, in violation" of U.S. Const. Art. I, § 7, cl. 1. (Proposed Second Amended Complaint, Count III, ¶ 71 ["Ex. F"].) Among other relief, Appellants sought the entry of a judgment "[d]eclaring the Senate Bill, if passed by the House of Representatives and/or signed into law by the President, null and void as passed in violation of" U.S. Const. Art. I, § 7, cl. 1 and "[e]njoining the enforcement and implementation of any resulting health care reform bill that is presented by Congress to the President and is signed by the President." (*Id.*, Count III, Prayer for Relief, ¶¶ (B) & (D).)

On July 27, 2010, the District Court, the Honorable Peter J. Messitte presiding, issued an Order denying Appellants' Motion for Leave to File Second Amended Complaint as to President Obama. (Order, filed July 28, 2010 ["Ex. G"].) In an accompanying Memorandum Opinion, Judge Messitte reasoned that the motion for leave to amend should be denied "[s]ince any amendment with regard to President Obama would be futile," concluding that Count III presented only nonjusticiable, political questions and that the relief sought against the President "is also nonredressable." (Mem. Op., p. 6 ["Ex. H"].)

Argument

I. It Would Be Impracticable To First Seek Relief Below.

While "ordinarily" a party must move first in the district court for an injunction while an appeal is pending, FRAP 8(a)(1)(C), "[a] motion for an injunction pending appeal may be made directly to the court of appeals when a party shows that moving in the district court would be impracticable." *Gonzalez v. Reno*, 2000 U.S. App. LEXIS 7025, *3 n. 4 (11th Cir. April 19, 2000) (No. 00-11424-D); *see* FRAP 8(a)(2)(A)(i). "When the district court's order demonstrates commitment to a particular resolution, application for a stay [or temporary injunction] from that same district court may be futile and hence impracticable." *CWWG v. Dep't of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996).

The District Court's July 27, 2010 order and memorandum opinion demonstrate a commitment to a particular resolution making application for a temporary injunction to that same district court futile. In denying the motion for leave to amend as to the President, the lower court held that the injunctive relief sought against the President is "nonredressable," citing *Franklin v.*

Massachusetts, 505 U.S. 788, 802-803 (1992) (plurality opinion) for the proposition that courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." (Mem. Op., p. 6.) Similarly, in denying Appellants' motion for a preliminary injunction, Judge Messitte, again citing *Franklin*, reasoned that "[t]he Court has no jurisdiction to issue an injunction against the President in his official capacity, and in the performance of non-ministerial actions." (Mem. Op., pp. 4-5.) As these portions of the district court's opinion demonstrate the futility and impracticality of again applying to the District Court for a temporary injunction, Appellants may apply for such relief directly to this Court in the first instance.

II. Plaintiffs Have Shown A Likelihood Of Success On The Merits.

This Court has the power to grant an injunction pending appeal to prevent irreparable harm to the party requesting such relief during the pendency of the appeal. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id. Accord*, *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). To obtain a preliminary injunction, a moving party must show: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346-347 (4th Cir. 2009), *vacated and remanded on other grounds*, 130 S. Ct. 2371 (2010). The movant bears the burden of showing that each of these factors supports granting the injunction. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th

Cir. 1991).

As will be shown below, Appellants meet the first factor as they are likely to succeed on the merits of their Origination Clause claim.

A. The Senate Bill is One for Raising Revenue.

The Origination Clause mandates that "[a]ll bills *for raising Revenue* shall originate in the House of Representatives." U.S. Const., Art. I, § 7, cl. 1 (emphasis added); *see U.S. v. Munoz-Flores*, 495 U.S. 385, 387 (1990). The Senate Bill is one "for raising Revenue." It raises hundreds of billions of dollars of revenue by way of new taxes, fees and penalties, including, but not limited to, higher Medicare payroll taxes on top earners; a tax on high end, "luxury" health insurance plans; the imposition of fees on health insurance companies and drug manufacturers; the imposition of an excise tax on medical device manufacturers; levying a tax on tanning salons; and the imposition of tax penalties on corporations and individuals. More importantly, the Senate Bill imposes these new taxes, fees and penalties, not just for the purpose of covering the cost of the health insurance reforms established by the Act, but also in order to achieve significant federal deficit reduction, i.e., to raise revenue to meet the overall obligations of the federal Government.

"[R]evenue bills are those that levy taxes in the strict sense of the word, . . . not bills for other purposes which may incidentally create revenue." *Twin City Nat'l Bank v. Nebeker*, 167 U.S. 196, 202 (1897); *accord*, *Munoz-Flores*, 495 U.S. at 397. This "mean[s] that a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Munoz-Flores*, 495

U.S. at 397.

In *Nebeker*, the Supreme Court rejected an Origination Clause challenge to what the statute denominated a "tax" on circulating notes of banking associations. The Court concluded that "[t]he tax was a means for effectually accomplishing the great object of giving to the people a currency . . . . *There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government.*" *Nebeker*, 167 U.S. at 203 (emphasis added). Similarly, in *Millard v. Roberts*, 202 U.S. 429 (1906), the Court upheld, as against an Origination Clause challenge, a statute that levied property taxes in the District of Columbia to support railroad projects, reasoning that "[w]hatever taxes are imposed are but means to the purposes provided by the act." 202 U.S. at 437.

Most recently, in *Munoz-Flores*, the Court turned aside an Origination Clause challenge to a provision, 18 U.S.C. § 3013, under which courts were required to impose a monetary special assessment on defendants convicted of federal misdemeanors. Proceeds of these special assessments were to be deposited into a Crime Victims Fund established by the Victims of Crime Act of 1984. The act provided "various mechanisms to provide money for the Fund, including the simultaneously enacted special assessment provision" at issue in *Munoz-Flores*. 495 U.S. at 398. Congress specified that if the total income to the Fund exceeded $100 million in any one year, the excess would be deposited in the general fund of the Treasury, 42 U.S.C. § 10601(c)(1). However, "nothing in the text or legislative history of the statute explicitly indicate[d] whether Congress expected that the $100 million cap would ever be exceeded" and "in fact, it never was." *Munoz-Flores*, 495 U.S. at 398-399. Special assessment revenues from the operation of 18 U.S.C. § 3013 accounted for just 4% of all deposits into the Crime Victims Fund.

As "[f]our percent of a minimal and infrequent excess over the statutory cap is properly considered 'incidental'," the Court in *Munoz-Flores* concluded:

> As in *Nebeker* and *Millard*, then, the special assessment provision was passed as part of a particular program to provide money for that program -- the Crime Victims Fund. Although any excess was to go to the Treasury, *there is no evidence that Congress contemplated the possibility of a substantial excess*, nor did such an excess in fact materialize.

495 U.S. at 399 (emphasis added).

In this case, unlike in *Nebeker*, *Millard*, and *Munoz-Flores*, Congress contemplated that the taxes imposed by the PPACA will generate a "substantial excess" of revenue beyond that needed to defray the cost of the health care reform programs established by the Act. Specifically, Congress anticipated that the taxes imposed by the Act will result in an excess of over $100 billion in revenue from 2010 to 2019, which excess revenue can be used to significantly reduce the federal deficit. In short, the PPACA has the purpose, not only to finance health care reform, but also "to raise revenue to be applied in meeting the expenses or obligations of the Government." *See Nebeker*, 167 U.S. at 203.

Furthermore, the health care subsidies and programs financed by these taxes will benefit groups of low-income citizens who are "entirely unrelated to the [high income] persons paying for the program[s]." *See Munoz-Flores*, 495 U.S. at 400 n. 7 (not reaching question "[w]hether a bill would be 'for raising Revenue' where the connection between payor and program was more attenuated . . ."). The Act contemplates a massive redistribution of wealth to pay for the health care reform programs established by its provisions.

In short, the PPACA is a "Bill[] for raising Revenue" that was required to originate in the House of Representatives by the Origination Clause.

B. The Revenue Raising Bill Originated in the Senate.

The Senate leadership attempted to circumvent the Origination Clause's requirement that a revenue-raising bill originate in the House of Representatives by taking up a House bill, specifically H.R. 3590, deleting its text, and substituting by way of a Manager's Amendment the text of the PPACA. In doing so, the Senate apparently relied on the Supreme Court's decisions in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911) and *Rainey v. U.S.*, 232 U.S. 310 (1914).

In *Flint*, the House had passed a general bill for the collection of revenue that contained an inheritance tax. The Senate deleted the inheritance tax and substituted a corporate tax, and the act was then passed as amended. Rejecting an Origination Clause challenge to the Senate's action, the Supreme Court reasoned that "[t]he bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case." 220 U.S. at 143. The Court further reasoned that "[t]he amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose." *Id.* In *Rainey*, the Supreme Court, per Chief Justice White, found unobjectionable the Senate's addition of a revenue amendment to a House-originated bill for raising revenue. 232 U.S. at 317.

This case is readily distinguishable from *Flint* and *Rainey*. In those cases, the House originated a revenue-raising bill, the Senate then amended the bill, and the amended bill was enacted. In this case, by contrast, the House originated *a non-revenue raising bill*, namely the

Service Members Home Ownership Tax Act of 2009; the Senate substituted a non-germane, revenue-raising bill, namely the PPACA; and the Senate bill was enacted. In view of *Nebeker*, *Millard*, and *Munoz -Flores*, the Service Members Home Ownership Tax Act of 2009 is clearly not a bill for raising revenue, since it enacts a program of financial assistance in the form of tax relief for service members and incidentally raises revenue to pay for that program. By contrast, the PPACA *is* a revenue raising bill, since the taxes imposed by that bill were purposely designed to generate a substantial excess of revenue over and above that needed to finance the health care reform programs established by that bill, specifically an excess of over $100 billion over a ten-year period, to be used for federal deficit reduction purposes. Furthermore, the PPACA is not at all germane to the subject matter of the House bill, which did not concern either health care reform or federal deficit reduction.

By substituting the PPACA for the Service Members Home Ownership Tax Act of 2009, the Senate did not simply amend a House-originated revenue-raising bill as in *Flint* and *Rainey*, but itself improperly originated a revenue-raising bill in violation of the Origination Clause. This constitutional violation was thereafter rendered complete by the actions of the House in passing, and the President in signing, the Senate-originated revenue-raising bill. Appellants have thus shown a likelihood of success on the merits of their Origination Clause claim.

C. The Claim Is Justiciable And Redressable

As *Munoz-Flores* held, an Origination Clause "has none of the characteristics that *Baker v. Carr* [, 369 U.S. 186 (1962)] identified as essential to a finding that a case raises a political question. *It is therefore justiciable*." 495 U.S. at 396 (emphasis added). Judge Messitte's ruling to the contrary fatally conflicts with the Supreme Court's

holding in *Munoz-Flores*.

As for redressability, Judge Messitte failed to consider that "numerous subordinate executive officials engage[] in the continued operation and enforcement of [the challenged Obamacare legislation's] provisions." *See Made in the USA Found. v. U.S.*, 242 F.3d 1300, 1310 (11th Cir.), *cert. denied*, 534 U.S. 1039 (2001). Thus, "even short of directly ordering the President to terminate [implementation and enforcement of the PPACA], a judicial order instructing the subordinate executive officials to cease their compliance with its provisions [will] suffice for standing purposes." *See id.* at 1310-1311. That the proposed Second Amended Complaint does not "identify subordinate [executive] officials who could be enjoined, as well as specific provisions [of the PPACA] that such officials should cease to implement in order to redress [the Appellants'] injuries . . . does not preclude a finding of redressability." *Id.* at 1311 n. 25. "The Supreme Court has held that a court has power under the All Writs Act, 28 U.S.C. § 1651(a), to issue commands that apply to 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.'" *Id.*, quoting *U.S. v. New York Tel. Co.*, 434 U.S. 159, 172-174 (1977).

In short, the redressability requirement for standing is fully satisfied by this Court's ability to issue injunctive relief against subordinate executive officials to halt the enforcement and implementation of the PPACA. "[S]uch partial relief is sufficient for standing purposes when determining whether [the Court] can order more complete relief [against the Defendant President himself] would require [the Court] to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996).

III. Appellants Likely Will Be Irreparably Harmed Absent Issuance Of A Temporary Injunction.

A movant must make a "clear showing" of a likelihood irreparable harm. *See Direx Israel*, 952 F.2d at 812. The required irreparable harm must be neither remote nor speculative but actual and imminent. *Id.*

"Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *cert. granted*, 130 S.Ct. 1755 (2010), citing *Monterey Mechanic Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) ("[A]lleged constitutional infringement will often alone constitute irreparable harm."); *see also Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy would certainly serve the public interest."); *cf. Déjà vu of Nashville, Inc. v. Metro. Gov't*, 466 F.3d 391, 394 (6th Cir. 2006) (a party is entitled to a permanent injunction once it establishes it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law), *cert. denied*, 549 U.S. 1339 (2007). The proposed Second Amended Complaint alleges that the passage by the House, and the signing by the President, of the Senate Bill violates the Origination Clause of Article I, Section 7 of the Constitution. This is an ongoing constitutional violation that cannot be adequately remedied through awards of monetary damages, and, thus, constitutes irreparable harm justifying the issuance of a temporary injunction. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (citation omitted).

Furthermore, Appellant physicians will be irreparably harmed if the requested temporary injunction does not issue. As Drs. Delaney and Uscinski have summarized in their affidavits attached to the proposed Second Amended Complaint and filed in support of this motion, continued enforcement and implementation of the Senate bill would have a severe detrimental effect on the doctors' practice of medicine, on the health and well being of their patients, and on the nature of the unique physician-patient relationship, injuries that by their very nature cannot be remedied through an award of money damages. As Dr. Uscinski pointed out in his most recent affidavit, "[w]ith this legislation the restrictions upon the ability of a physician, particularly one as skilled as a neurosurgeon, to exercise comprehensive and sober clinical judgment in a high-risk setting is compromised to a hitherto unheard of degree," which is "not good patient care."

Finally, the irreparable harm is actual and continuing. The Senate-originated PPACA has been enacted and is being enforced and implemented by the President, including the drafting and promulgation of regulations, and the imposition and collection of the many taxes, fees and penalties imposed by that legislation. The Origination Clause violation is an ongoing constitutional wrong that, absent a temporary injunction, will continue unabated during the pendency of the appeal.

In short, Appellants have made a clear showing that they are likely to suffer irreparable harm unless a temporary injunction pending appeal is granted.

III. The Balance of Equities Tips in Favor of Issuing the Requested Temporary Injunction.

The balance of equities tips decidedly in favor of Appellants. The likelihood of irreparable harm if a

temporary injunction does not issue is very great, since enforcement and implementation of the unconstitutional PPACA by the President cannot be adequately remedied by an award of monetary damages. Absent a temporary injunction, the President will be free to enforce and implement this unconstitutional legislation.

On the other hand, issuance of the injunction will result in little or no harm to the President. The temporary injunction simply restrains the President from enforcing or implementing a bill that is null and void for failure to adhere to the requirement of the Origination Clause in its passage. The likelihood of irreparable harm to Plaintiffs far outweighs the harm, if any, to the President.

IV. The Public Interest Favors Issuance of the Requested Temporary Injunction.

This Court has recognized that, "upholding constitutional rights serves the public interest." *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). *Accord, Preston v. Thompson*, 589 F.2d at 303 n. 3 (to remedy constitutional violations "certainly serve the public interest"). Issuance of a temporary injunction to prevent the President from enforcing or implementing a revenue bill that has been enacted without adhering to the mandatory requirement of the Constitution's Origination Clause would certainly serve the public interest. The Origination Clause embodies the principle that the House of Representatives, being the house of Congress most accountable to the people, should have the exclusive power to originate revenue-raising legislation. *See U.S. ex rel. Michels v. James*, 26 Fed. Cas. 577, 578 (C.C.S.D.N.Y. 1875) (No. 15, 464) ("In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate

them."). The safeguard of popular accountability, and the immediate representatives' "jealous regard for the pecuniary interests of the people" serve to ensure that the House will be "especially watchful" in protecting the interests of those whom they represent. *Id.*

Preserving the principle "no taxation without [immediate] representation" that is served by the Origination Clause is necessary to prevent the exercise of tyranny and arbitrary power to the grave detriment of the taxpayers and citizenry of the United States. The PUBLIC INTEREST therefore weighs heavily in favor of the issuance of the requested TEMPORARY INJUNCTION.

Conclusion

In view of the arguments made and authorities cited above, Appellants respectfully request that the Court grant their Motion for Temporary Injunction Pending Appeal, and that an Order be entered enjoining the Defendant President and/or his subordinates from taking any further action to enforce or implement any of the provisions of the PPACA pending the resolution of this appeal and the
issuance of the Court's mandate.

Respectfully submitted,

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Certificate of Service

I, R. Martin Palmer, do hereby certify that a true and correct copy of the foregoing Motion for Temporary Injunction Pending Appeal has been served, by depositing the copy, postage prepaid, in the United States mail on this 19th day of August, 2010, on the following counsel for Defendant-Appellee:

Erika L. Myers
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7303
Washington, D.C. 20001

s/R. Martin Palmer
R. Martin Palmer

H.R. 3590 increased the penalty for failure to file a partnership or S Corporation return, from $89 to $110 per partner or shareholder, and made certain other revenue enhancing adjustments. These provisions were an incidental effort to make the bill revenue neutral by off-setting, in whole or in part, the loss of revenue created by providing tax breaks to service members. The Joint Committee on Taxation (JCT) estimated that, for the period 2010-2019, H.R. 3590 would generate net revenue of only $7 million, and that in the first three years after it was enacted (2010-2012), substantial losses in tax revenue would be experienced. *See* JCT, Estimated Revenue Effects of H.R. 3590, JCX-40-09 (Oct. 6, 2009) ["Ex. B"].

Increased to a tax penalty of $2000 per employee by the Reconciliation Act.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DANIEL ANDERSON, et al.,

Plaintiffs-Appellants,

v. No. 10-1951

BARACK OBAMA,

Defendant-Appellee.

DEFENDANT-APPELLEE'S OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL AND CROSS-MOTION TO DISMISS APPEAL

Plaintiffs-appellants ask this Court to enjoin as unconstitutional a federal statute enacted by Congress to reform the Nation's health care system. Plaintiffs do not meet any of the requirements for extraordinary relief, identifying no imminent harm of any kind that would justify issuance of an injunction, much less the type of harm that might permit a courtto suspend an Act of Congress.

The Court may resolve the appeal expeditiously without further briefing by dismissing this appeal. Plaintiffs' claims fail at every level. First, as the district court held, their grievances are not remediable through a suit against the President, against whom declaratory and injunctive relief would be improper. See Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992) (plurality

opinion). Second, plaintiffs have failed to demonstrate any injury beyond the type of generalized policy disagreement that cannot form the basis of Article III standing.

Third, plaintiffs' contention that Congress enacted the statute in violation of the Origination Clause is entirely insubstantial.

In sum, plaintiffs' motion should be denied and the appeal should be dismissed for lack of Article III standing and for failure to present a substantial federal question.

STATEMENT

Congress enacted the Patient Protection and Affordable Care Act ("Affordable Care Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), on March 23, 2010. The statute reforms the Nation's health care system in multiple respects, addressing the availability of health insurance, the contours of public health programs, and the quality and efficiency of health care provided in the United States. Plaintiffs-appellants filed suit on January 5, 2010, eleven weeks prior to passage of the Affordable Care Act. They sought declaratory and injunctive relief against President Barack Obama, alleging that the President had "usurped, swallowed and absorbed the powers of the Legislative branch of the Government" by "intimidating and coercing" Senator Ben Nelson into voting favorably on the Act during consideration by the Senate.

Pursuant to Fourth Circuit Rule 27(a), government counsel left notice of our intent to file this motion with the telephone answering service of plaintiffs' counsel. We have not yet received plaintiffs' position on this motion.
The statute was amended shortly thereafter by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).

Plaintiffs contended that they risked a variety of "adverse effects" from the statute if enacted, including "the loss of the practice of medicine as we have known it"; destruction of the doctor-patient relationship; and large-scale retirement of practicing physicians. Id. at 13. Plaintiffs amended their complaint ten days later to allege additional purported misconduct and to expand their requested relief to include an injunction against enforcement of "any resulting reconciled or merged health care bill." Doc. 3 at 15, 20. Plaintiffs sought a preliminary injunction and, after the government filed its opposition and moved to dismiss the suit, sought leave to file a second amended complaint joining members of Congress as defendants and adding counts challenging the still unenacted statute under various requirements of Article I, Section 7 of the Constitution. Docs. 39, 42-43. The district court dismissed the first amended complaint. Doc. 45. The court subsequently denied plaintiffs' motions for a preliminary injunction and for leave to further amend the complaint as to President Obama, explaining that the court possessed "no jurisdiction to issue an injunction against the President in his official capacity and in the performance of non-ministerial actions" and that plaintiffs' claims against the President were thus not redressable. Doc. 56, at 4, 6 (citing Franklin v. Massachusetts, 505 U.S. 788, 802-03 (1992) (plurality opinion)).

The court deferred plaintiffs' motion to amend as to members of Congress, to allow for proper service. Doc. 56, at 7. Plaintiffs voluntarily dismissed their claims against those defendants, and the district court ordered that the case be closed on August 11, 2010. Docs. 58-59. Plaintiffs filed anotice of appeal on August 13. Doc. 60.

ARGUMENT

Plaintiffs "are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress. Unlike a stay, which temporarily suspends 'judicial alteration of the status quo,' an injunction 'grants judicial intervention that has been withheld by the lower courts.'" Turner Broad. Sys. v. FCC, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers) (quoting Ohio Citizens For Responsible Energy, Inc. v. NRC, 479 U. S. 1312, 1313 (1986) (Scalia, J., in chambers)). For these reasons, "[a]n injunction pending appeal" that "bar[s] the enforcement of an Act of Congress [is] an extraordinary remedy." Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1305-06 (2004) (Rehnquist, C.J., in chambers). See also Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 376 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.").

In assessing the propriety of such relief, this Court weighs a plaintiff's likelihood of success on the merits, the balance ofharms between the parties, and the public interest. See Conservation Council v. Costanzo, 528 F.2d 250, 252 (4th Cir. 1975) (per curiam); Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 n.9 (4th Cir. 1991). Plaintiffs must establish that "the legal rights at issue are 'indisputably clear.'" Turner Broad. Sys., 507 U.S. at 1301 (citation omitted). These factors uniformly counsel against plaintiffs' request for this Court to enjoin the federal statute pending their appeal from the district court's dismissal of the case.

I. Plaintiffs Have Demonstrated Neither Standing Nor A Substantial Constitutional Claim.

As the following discussion demonstrates, no further briefing is required. The Court should resolve the appeal expeditiously by dismissing this appeal for lack of subject matter jurisdiction.

A. Plaintiffs Lack Standing To Bring This Suit.

"In order to satisfy Article III's standing requirements, [a] plaintiff must show that: (1) he has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002). Plaintiffs have failed to meet the bedrock requirement of demonstrating an injury that is "personal, particularized, concrete, and otherwise judicially cognizable." Raines v. Byrd, 521 U.S. 811, 820 (1997). Nor could a court grant the relief they seek to redress their generalized grievances—an order "enjoin[ing] the President in the performance of his official duties." Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866).

1. Plaintiffs Have Suffered No Injury In Fact.

A plaintiff may not satisfy constitutional standing requirements by "'raising only a generally available grievance about government—claiming only harm to his . . . interest in proper application of the Constitution and laws.'" Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992)). "[A]n injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable," Lujan, 504 U.S. at 575; neither is "the psychological consequence presumably produced by observation of conduct with which one disagrees[,] . . . even though the disagreement is phrased in constitutional terms." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 485-86 (1982).

Plaintiffs identify no action that the statute requires them to take or to refrain from taking. They also fail to describe any deleterious effects that the Act will impose upon them personally. To the contrary, they apparently claim to have standing because that they "question deeply that the framers of our constitution had any thought of denying free citizens access to the legitimate medical care of their own choosing" and "deny that Congress is privileged to force physicians to practice medicine deficiently as would be mandated by currently proposed health care plans." Doc. 3, at 24 (First Amended Compl., Exh. A, Delaney Aff., at 4). See also id. at 21 ("I deplore the loss of the practice of medicine as we have known it and the harm that socialized medicine will do to my patients."); Mot. at 18 (asserting that implementation and enforcement of the Act "would have a severe detrimental effect on the doctors' practice of medicine, on the health and well being of their patients, and on the nature of the unique physician-patient relationship"). Such generalized allegations are insufficient to support Article III standing. See, e.g., Lujan, 504 U.S. at 573-575; Ex Parte Levitt, 302 U.S. 633, 634 (1937) (per curiam). To the extent that plaintiffs contend (Mot. at 4-6) that various provisions of the Act are unconstitutional taxes, they make no claim that they are presently affected by such provisions, many of which will not take effect for several years. Moreover, insofar as plaintiffs challenge these portions of the Act as taxes, such claims are barred by the Anti-Injunction Act, which prohibits a "suit for the purpose of restraining the assessment or collection of any tax . . . in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a).

2. Plaintiffs Are Barred From Obtaining Injunctive Relief Against The President.

Plaintiffs' suit is also barred by the well established principle that courts lack the authority "'to enjoin the President in performance of his official duties.'" Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)). "The Supreme Court has confirmed that a 'grant of injunctive relief against the President himself is extraordinary, and should . . . raise[] judicial eyebrows.'" Swan v. Clinton, 100 F.3d 973, 977 (D.C. Cir. 1996) (quoting Franklin, 505 U.S. at 802 (plurality opinion)); see also Franklin, 505 U.S. at 826 (Scalia, J., concurring in part and concurring in the judgment) ("I think it clear that no court has authority to direct the President to take an official act."). Here, despite plaintiffs' two attempts to amend their complaint, the only Defendant in this action is the President of the United States, and plaintiffs' request for injunctive relief against him is foreclosed.

B. Plaintiffs' Constitutional Claims Are Meritless. Even if plaintiffs could demonstrate standing, their Plaintiffs' reliance (Mot. at 16-17) on the D.C. Circuit's 3 decision in Swan v. Clinton is entirely misplaced. In that case, the President was not the sole defendant, and the court concluded that meaningful relief could be awarded against subordinate officials who were named as co-defendants. See 100 F.3d at 979-80. Plaintiffs also erroneously invoke (Mot. at 16) the Eleventh Circuit's decision in Made in the USA Foundation v. United States, 242 F.3d 1300, 1310-11 (11th Cir. 2001), which concerned a suit against the United States rather than against the President alone in his official capacity. constitutional claims are meritless. They contend that the Affordable Care Act did not originate in the House of Representatives and thus violated the constitutional requirement that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate

may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7. The Supreme Court has never invalidated an Act of Congress on that basis. Plaintiffs offer no reason to break new ground in this regard.

As plaintiffs recognize, H.R. 3590, the bill that would ultimately become the Affordable Care Act, was first introducedin the House. H.R. 3590 was subsequently amended by the Senate, agreed to by the House, and submitted to the President who signed it into law. That is precisely the procedure contemplated by the Origination Clause, which provides that "the Senate may propose or concur with Amendments [of bills for raising revenue] as on other Bills." The Senate may adopt any amendment it deems advisable to such bills, including an amendment in the form of a substitute. See, e.g., Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911) (Senate amendment replacing an inheritance tax with a corporation tax was valid); Boday v. United States, 759 F.2d 1472, 1476 (9th Cir. 1985) (agreeing that "nothing in article I, section 7 states that the Senate may not amend revenue raising bills by substituting the text of those bills" (citing Flint, 220U.S. 107)); Harris v. IRS, 758 F.2d 456, 458 (9th Cir. 1985) similar).

Plaintiffs assert (Mot. at 14-15) that the Senate amendments were not "germane" to H.R. 3590. But where, as here, a bill has "become an enrolled and duly authenticated act of Congress, it is not for [a] court to determine whether the amendment was or was not outside the purposes of the original bill." Rainey v. United States, 232 U.S. 310, 317 (1914). See also United States v. Munoz-Flores, 495 U.S. 385, 410 (1990) (Scalia, J., concurring in the judgment). When the Senate has amended legislation in 4 similar fashion in other instances, the courts of appeals have Plaintiffs contend, on the one hand, that the original 4 House version of H.R. 3590 was not a "Bill for raising Revenue,"and, on the other hand, that the

statute as ultimately enacted is
such a bill and therefore violates the Origination Clause. Plaintiffs are incorrect on both grounds. First, the express purpose of the original House bill was "[t]o amend the Internal Revenue Code of 1986," and, as plaintiffs acknowledge, the bill contained provisions that increased some revenue-raising provisions of the Internal Revenue Code and decreased others. See H.R. 3590, secs. 5-6 (Sept. 17, 2009). Inclusion of both tax decreases and tax increases does not render H.R. 3590 any less a bill for raising revenue. See, e.g., Armstrong v. United States, 759 F.2d 1378, 1381 (9th Cir. 1985) ("The term 'Bills for raising Revenue' does not refer only to laws increasing taxes, but instead refers in general to all laws relating to taxes.").

Second, even if plaintiffs were correct that the original House version of H.R. 3590 was not a "Bill for raising Revenue," the statute as enacted clearly would not be such a bill either—and therefore would not be encompassed by the Origination Clause. See Twin City Nat'l Bank v. Nebecker, 167 U.S. 196, 202 (1897) ("[R]evenue bills are those that levy taxes, in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue."); Millard v. Roberts, 202 U.S. 429, 436-37 (1906) (rejecting an Origination Clause challenge to provisions levying taxes on property within the District of Columbia to finance railroad construction); South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983) (exercises of Commerce Clause power are not subject to the Origination Clause) repeatedly rejected Origination Clause challenges to such action. See, e.g., Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 164, 168 (5th Cir. 1985) (rejecting an Origination Clause challenge to the Tax Equity and Fiscal Responsibility Act of 1982, in which the Senate "struck the entire text of the bill after the enacting clause and replaced it with a

massive tax-increasing proposal"); Jolly v. United States, 764 F.2d 642, 644-45 (9th Cir. 1985); Wardell v. United States, 757 F.2d 203, 204 (8th Cir. 1985) (per curiam); Liljenfeldt v. United States, 588 F. Supp. 966, 972 (E.D. Wis.), aff'd mem., 753 F.2d 1077 (7th Cir. 1984) (table); Rowe v. United States, 583 F. Supp. 1516, 1519 (D. Del.), aff'd mem., 749 F.2d 27 (3d Cir. 1984) (table). Here, Congress determined that the Senate amendment of H.R. 3590 was sufficiently related to the original bill to be germane. This Court may not second-guess that judgment. See Armstrong, 759 F.2d at 1382; Harris, 758 F.2d at 458.

II. Even If Plaintiffs' Claims Were Not Clearly Meritless,
The Balance Of Harms And The Public Interest Would Not Support An Injunction Pending Appeal.

Even if plaintiffs' suit were not foreclosed both as a matter of justiciability and on its merits, the balance of harms and the public interest weigh heavily against this Court enjoining an Act of Congress as plaintiffs request pending their appeal of the district court's dismissal of their challenge to that Act. "[S]tatutes are presumptively constitutional and, absent compelling equities on the other side . . . should remain in effect" pending appellate review. New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1352 (1977) (Rehnquist, J., in chambers); Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers). The interim invalidation of any statute causes recognized injury. See New Motor Vehicle Bd., 434 U.S. at 1351; see also Walters v. Nat'l Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers) Invalidation of the Affordable Care Act would result in immediate harm to citizens who benefit from the provisions that take effect this year. See, e.g., Pub. L. No. 111-148, § 10101(a) (prohibiting plans from establishing lifetime maximum

limits on coverage); id. § 1101(a) (requiring the Secretary to create insurance pools for high risk individuals within 90 days of the statute's enactment); id. §§ 1201(2)(A), 10103(e) (prohibiting exclusions from insurance coverage for enrollees under 19 years of age with pre-existing conditions, effective six months after enactment). Plaintiffs, by contrast, have identified no harm whatsoever from allowing the statute to remain in effect. They assert (Mot. at 18) only general irreparable harm in the form of a "severe detrimental effect on the doctors' practice of medicine, on the health and well being of their patients, and on the nature of the unique physician-patient relationship." As discussed above, these amorphous harms are not legally cognizable at all, let alone sufficiently weighty to offset the acute interest in allowing a lawful act of Congress to remain in full force and effect. Plaintiffs have failed to demonstrate that these purported and inchoate harms are anything more than speculative; they are certainly not imminent. Plaintiffs' assertion (Mot. At 18) that they are suffering an "ongoing constitutional violation" similarly cannot justify enjoining an Act of Congress, particularly given the tenuous nature of plaintiffs' constitutional arguments.

For these reasons, as well as the reasons discussed above, plaintiffs' motion for injunctive relief pending appeal should be denied. Moreover, because plaintiffs lack Article III standing and because plaintiffs' claims are wholly insubstantial, the Court should dismiss this appeal. See, e.g., Marshall v. Meadows, 105 F.3d 904, 906-07 (4th Cir. 1997) (dismissing appeal for lack of Article III standing); Neitzke v. Williams, 490 U.S. 319, 327 n.6 (1989) (noting that "federal courts lack power to entertain claims that are 'so attenuated and unsubstantial as to be absolutely devoid of merit'" (quoting Hagans v. Lavine, 415 U.S. 528, 536 (1974))).

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a temporary injunction pending appeal should be denied, and this
appeal should be dismissed.

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August 26, 2010 Washington, D.C. 20530-0001

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2010, I electronically filed the foregoing opposition and cross-motion with the Court by using the appellate CM/ECF system. I further certify that the foregoing motion was served on all parties or their counsel of record through the CM/ECF system.

/s/ Eric Fleisig-Greene
Counsel for Appellee

No. 10-1951

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL G. ANDERSON; JENNIFER R. BOYER; WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D.; JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD USCINSKI, M.D.,

Plaintiffs-Appellants,

v.

BARACK HUSSEIN OBAMA, in his official capacity as President of the United States,

Defendant-Appellee.

On Appeal From an Order of the United States District Court for the District of Maryland

APPELLANTS' MOTION FOR RECONSIDERATION OF COURT'S ORDER DENYING MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL, REPLY TO APPELLEE'S OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL, AND OPPOSITION TO CROSS-MOTION TO DISMISS APPEAL

Appellants hereby submit their Motion for Reconsideration of the Court's Order of August 30, 2010, denying Appellants' Motion for Temporary Injunction

Pending Appeal, their Reply to Appellee's Opposition to Appellants' Motion for Temporary Injunction Pending Appeal, and their Opposition to Appellee's Cross-Motion to Dismiss Appeal. There has not been a smokescreen like this since the Lucky Strike commercials of black and white television. The Government deploys its smokescreen by making a frivolous motion to summarily dismiss this appeal without briefing on the merits or oral argument, by ignoring the fact that Appellants have federal taxpayer standing to raise their Origination Clause challenge, and by largely squeezing Appellee's substantive response to the merits of Appellants' Origination Clause challenge into a single footnote (Opp., p. 10 n. 4). That smokescreen cannot hide, however, that Appellants are likely to succeed on the merits, i.e., that the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (hereinafter "the PPACA") **originated** in the Senate as a revenue raising bill, and that the equities weigh heavily in favor of the issuance of **Temporary Injunctive Relief**. It is respectfully proffered therefore that the Court should reconsider its Order denying the motion for temporary injunction pending appeal and do what the people look to the court to do -- be their Captains Courageous!

I. Appellants Have Shown A Likelihood Of Success On The Merits.

A. The PPACA Is A Revenue Raising Bill That Originated In The Senate.

The attempted bypass of the Origination Clause by the party in power is worse than a smokescreen; it is a transparent sham. They took a bill that originally passed the House to assist with affordable housing for returning servicemen (which was unopposed). It had absolutely nothing to do with health care. They then sent it over to the Senate where it was gutted (leaving only the bill

number at the top and deleting everything after the words "Be it resolved:" and then inserted the 2,000-plus page health bill (**pretending it had originated in the House,** a transparent attempt to avoid compliance with the Origination Clause). This is child's play, but it turns out to be devilish mischief for the cathedral of American medicine which has been shaken to its foundations. The Government argues that the House version of H.R. 3590, the Service Members Home Ownership Tax Act of 2009, was a "Bill for raising Revenue" because it "contained provisions that increased some revenue-raising provisions of the Internal Revenue Code and decreased others." (Opp., p. 10, n. 4.) The Government fails to acknowledge that the principal purpose of H.R. 3590, as it passed in the House, was enactment of a program of financial assistance in the form of tax breaks for service members and that the bill only incidentally raised revenue to pay for that program. Under binding Supreme Court precedent (which the Government fails to address), such a bill is not one to raise revenue to which the Origination Clause applies. *See United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990) ("[A] statute that creates a particular government program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bill for raising Revenue' within the meaning of the Origination Clause."); *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906); *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) ("revenue bills . . . are not bills for other purposes which may incidentally create revenue").

The Government cites the Ninth Circuit's decision in *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) for the proposition that revenue-raising bills refer not just to "laws increasing taxes, but [also] . . . to all laws *relating to* taxes." (Emphasis added.) This view, that the Origination Clause applies to "revenue related" bills, not just revenue-raisers, has not been adopted either by

the Supreme Court or this Court. It directly conflicts with the interpretation of other lower courts addressing origination clause challenges under both the federal and state constitutions. *See, e.g., Bertelsen v. White*, 65 F.2d 719, 722 (1st Cir. 1933) (bill that diminishes revenue of the government is not a bill to raise revenue under the Origination Clause); *Baines v. New Hampshire Senate President*, 152 N.H. 124, 876 A.2d 768 (2005) (addressing challenge under origination clause in New Hampshire Constitution; "*[r]aising revenue*, in the context of the origination clause, *implies that the purpose of a measure must be to increase revenue for the support of Government* through the operation of the taxing power") (emphasis added); *Mobil Oil Corp. v. Greenwich Twp.*, 22 N.J. Tax 1, 2004 N.J. Tax LEXIS 3172517, *9 (N.J. Tax Ct. 2004) (rejecting challenge under origination clause in New Jersey Constitution; act that was not intended to raise revenue and that anticipated some property that was previously taxed would be exempt was not a bill to raise revenue). More importantly, it conflicts with the Supreme Court's decision in *Munoz-Flores*, decided five years after *Armstrong*. *Munoz-Flores* held that a bill does not qualify as one for raising revenue unless "Congress contemplated the possibility of a substantial excess" of revenue that would go to the Treasury. *Munoz-Flores*, 495 U.S. at 399.

Even if it could be said that *Armstrong* survives *Munoz-Flores*, *Armstrong* is distinguishable. *Armstrong* involved an Origination Clause challenge to the Tax Equality and Fiscal Responsibility Act of 1982 ("TEFRA"), which has been described by this Court as a "comprehensive tax reform bill." *Doe v. Chao*, 306 F.3d 170, 191 (4th Cir. 2002), *aff'd*, 540 U.S. 614 (2004). By contrast, the House version of H.R. 3590 created a single program of tax breaks for service members, to be paid for by incidental revenue increases, and is therefore much closer to the statutes creating government programs with incidental revenue increases held not to constitute

revenue bills in *Nebeker*, *Millard*, and *Munoz-Flores*.

The Government further argues that, even if H.R. 3590 was not a "Bill for raising Revenue," the PPACA "as enacted clearly would not be such a bill either," citing *Nebeker* and *Millard*. (Opp., p. 10 n. 4.) Unlike the bills at issue in those cases which only "incidentally" created revenue, the PPACA was designed and intended to increase revenue to a very substantial extent over and above the monies needed to fund the health insurance reform programs created thereby – specifically to create an excess ***of over $100 billion*** – to be used for federal deficit reduction purposes and thus to support Government generally. It can hardly be said that over $100 billion is "incidental." Thus, the PPACA, as substituted for the House version of H.R. 3590, was a revenue-raising bill that originated in the Senate.

Nor was the Senate substitute at all germane to the House version of H.R. 3590. The Government nonetheless argues that inquiry into whether the Senate substitute was germane and therefore constituted a proper amendment to the House bill is barred by the enrolled bill doctrine first announced by the Supreme Court in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). (Opp., p. 10, citing *Rainey v. United States*, 232 U.S. 310, 317 (1914).) The Supreme Court, however, has specifically held that the enrolled bill doctrine does not apply to Origination Clause challenges. *Munoz-Flores*, 495 U.S. at 391 n. 4 ("Where, as here, a constitutional provision [, i.e., the Origination Clause,] is implicated, *Field* does not apply."); D. Sandler, *Forget What You Learned In Civics Class: The "Enrolled Bill Rule" and Why It's Time To Overrule Field v. Clark*, 41 Colum. J. L. & Soc. Probs. 213, 229 (2007) (the Court in *Munoz-Flores* "found the enrolled bill rule to be inapposite" to Origination Clause challenges).

The Government's reliance on *Armstrong* is again misplaced: the Ninth Circuit in that case found that the

Senate amendments to TEFRA, "while far-reaching and extensive, were 'germane to the subject matter of the bill [reform of the income tax system], and not beyond the power of the Senate to propose.'" *Armstrong*, 759 F.2d at 1382, quoting *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911). By contrast, the Senate substitute of the PPACA, a massive health care reform bill, was not in the least germane to the House bill, which involved entirely unrelated tax breaks for service members.

In their answer, Defendant-Appellee conveniently overlooks making any mention of **PLAINTIFF JENNIFER R. BOYER**, who was added to Appellants' Second Amended Complaint as an additional Plaintiff below. **JENNIFER R. BOYER'S** 'standing' as a legitimate Plaintiff is subsumed in her affidavit filed in the District Court below, which states in pertinent part as follows:

"I am 24 years old. I have spent countless hours in high school and college preparing myself for the challenge of medical school and a career as a physician. I wanted to become a doctor so I could counsel and treat patients on a professional level, with the hope that every once in a while I could change, improve and even save people's lives."

"I received an offer of admittance to medical school in the spring of 2009. I deferred my acceptance and have spent almost a year analyzing the cost of my dream against the benefit. The average medical school student will acquire nearly $200,000 in debt over four years of rigorous coursework. Additionally, medical students willingly trade four years of their young lives for the vast knowledge required to effectively treat patients."

"Until this past year, I would have gladly taken on the debt and the workload necessary to fulfill my dream because the relationships that doctors develop with their patients over an entire career are invaluable. But
--Obama's health care plan will make doctors nothing more than a name on a list of providers. The level of care doctors are able to provide will be limited to the allowed services on government-funded health insurance plans."

"At this point, I ask myself, 'Why should I take on the debt, make the personal sacrifices, and spend the time to become a physician? I will most likely end up as a subordinate, catering to someone else's ideas.' Honestly, in this political climate, I think it makes more sense to become a Physician's Assistant. I could still see patients and impact lives, but I can reach that point in less than half the time with less than half the debt and only a fraction of the headaches."

"Obama's decision to tackle health care reform so quickly and WITH SO LITTLE THOUGHT TO THE FUTURE OF AMERICA'S DOCTORS is taking away many of the incentives that drive bright, young students to pursue a career in medicine. Such a decision should not be made lightly because it could have a DRASTIC IMPACT ON THE FUTURE OF MEDICINE." /s/Jennifer R. Boyer (emphasis supplied)

JENNIFER wrote these words **HERSELF**. In his rush to play politics with **AMERICAN MEDICINE,** Barack Hussein Obama is about to lose the next generation of the 'brightest and the best' desiring to go into the practice of medicine. The current generation of

doctors will not always be around. They will leave their stethoscopes and operating instruments behind. But what can be said of the hands that will take them up?

Curiously, the indubitable standing of **JENNIFER BOYER** (a potential 'doctor to be') is entirely overlooked by the President and his attorneys as they seek to denigrate the standing of Plaintiff-Appellants, asking that they, their case, their appeal and their Motion for **Temporary Injunction** be denied and dismissed summarily in accord with the iron-fisted will of this current Chief Executive.

B. Plaintiffs-Appellants Have Taxpayer Standing.

The Government's argument that the remaining physician Appellants have suffered no injury in fact totally ignores, among other matters, the allegations of the proposed Second Amended Complaint that Appellants are federal taxpayers. Appellants have alleged a legally cognizable injury under the test for federal taxpayer standing set forth in *Flast v. Cohen*, 392 U.S. 83 (1968). Under that test, "taxpayers do have standing to question the constitutionality of congressional appropriations if they can demonstrate both a logical link between their status as taxpayers and the challenged legislation and a nexus between their taxpayer status and the claimed constitutional infringement." *Harrington v. Schlesinger*, 528 F.2d 425, 457 (4th Cir. 1975), citing *Flast v. Cohen*.

In this case, Appellants, as federal taxpayers, (see Affidavit of Richard P. Delaney attached hereto as Exhibit A and Affidavit of Ronald Uscinski attached hereto as Exhibit B) can show a logical link between their status as taxpayers and the challenged PPACA, because the additional taxes levied and the additional appropriations made by that legislation, if it is enforced and fully implemented, will inevitably increase the amount of federal taxes that each of the Appellants will be required to pay in future years. In addition, Appellants can

demonstrate a nexus between their taxpayer status and the claimed constitutional infringement, i.e., the violation of the Origination Clause of Article I, Section 7, since the purpose of the Origination Clause was to act as a check on Congress' power to tax and spend by ensuring that any revenue raising bill originate in the more representative body of Congress, namely the House of Representatives, rather than in the Senate.

That federal taxpayers have standing to assert Origination Clause challenges can be seen from the fact that "private taxpayers have been found to have standing to challenge the constitutionality of TEFRA under the Origination Clause[.]" *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 & n. 51 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), *disapproved on other grounds by Raines v. Byrd*, 521 U.S. 811 (1997), citing *Armstrong v. United States*, (S.D. Cal. Sep. 3, 1983) and *Frent v. United States*, 571 F. Supp. 739 (E.D. Mich. 1983), *appeal dism'd*, 734 F.2d 14 (6th Cir. 1984); *see also Schlick v. United States*, 1984 U.S. Dist. LEXIS 23313, *5 (N.D. Ill. Sept. 25, 1984) (No. 83 C 6335) ("The many courts which have ruled on the constitutionality of TEFRA [under the Origination Clause] have recognized private taxpayers' standing and have attempted to resolve the issue."). Even before TEFRA, "private taxpayer plaintiffs have asserted claims under the Origination Clause[.]" *Moore v. United States House of Representatives*, 553 F. Supp. 267, 272 (1982), *aff'd*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), *disapproved on other grounds by Raines v. Byrd*, 521 U.S. 811 (1997), citing *Rainey, Flint, Millard, Nebeker, Bertelsen*, and *Hubbard v. Lowe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dism'd*, 242 U.S. 654 (1916).

It makes no difference to Appellants' taxpayer standing that many of the taxes imposed by the PPACA "will not take effect for several years." (Opp., p. 7.) As this Court has recognized, "[c]ourts have left . . . no doubt that threatened injury to [the plaintiff] is injury in fact."

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. ["*Gaston Copper*"], 204 F.3d 149, 160 (4th Cir. 2000) (en banc). "The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III requirements." *Id.* (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) and *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); *see also Friends of the Earth, Inc. v. Laidlaw Envt'l Services*, 528 U.S. 167, 180-181, 185-186 (2000). "'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Gaston Copper*, 204 F.3d at 160 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

"Threats or increased risk thus constitutes cognizable harm." *Gaston Copper*, 204 F.3d at 160. *Accord*, *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004) ("a concrete *risk* of harm to [the plaintiffs] . . . is sufficient for injury in fact") (emphasis added); *Central Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2000) ("a credible *threat* of harm" constitutes "actual injury") (emphasis added); *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001) ("evidence of a credible *threat* to the plaintiff's physical well being from airborne pollutants" sufficient to satisfy injury in fact requirement) (emphasis added); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234-1235 (D.C. Cir. 1996) (incremental increase in risk of forest fire is sufficient for standing purposes).

Appellants are currently under the threat of increased taxes, due to the anticipated future imposition of the specific taxes levied by the PPACA. Appellants are further subject to a concrete risk of additional federal taxes being imposed on them to defray the expenditures called for by the PPACA if, as is likely, Congress underestimated the cost of the health care reform measures

enacted as part of the PPACA. These threats or concrete risks of harm are sufficient for injury in fact in full satisfaction of Article III standing requirements.

As for the Anti-Injunction Act, that act prohibits "suit for the purpose of restraining the assessment or collection of any tax . . . in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). First, the Act does not preclude a federal taxpayer suit to enjoin the enforcement and implementation those portions of the PPACA that do not involve the assessment and collection of the taxes imposed by that legislation. Secondly, while the Anti-Injunction Act applies to Origination Clause challenges to the assessment or collection of federal taxes, there is an exception to its application if the two-prong test of *Enochs v. Williams Packing & Navigation Co.*, 310 U.S. 1, 7 (1962) is met. Specifically, "[t]he plaintiff must show both that he faces irreparable injury such that equity jurisdiction exists and that the government has no chance of ultimately prevailing on the merits of the dispute." *Graham v. United States*, 573 F. Supp. 578, 851 (E.D. Pa. 1983).

As shown above, the Government has no chance of ultimately prevailing on the Origination Clause issue, particularly since the substitution by the Senate of the PPACA for the House version of H.R. 3590 was clearly not germane to the subject matter of the House bill. Secondly, Appellants face irreparable injury to the basic right guaranteed by the Origination Clause, namely that "the people ought to hold the purse strings," 1 *Journal of the Federal Convention* 158 (E.H. Scott ed. 1894), by requiring that revenue raising bills be originated in the house of Congress that is closer to those subject to the taxing power. If Appellants are forced to wait for many years, until after they have paid taxes under the PPACA and then filed an action for a tax refund, before challenging the constitutionality of the taxes so levied and collected

under the Origination Clause, the value of their right to hold the purse strings will be greatly and irretrievably eroded, if not entirely dissipated. This irreparable harm includes the fact that such a long delayed response to a violation of the Origination Clause will have little or no deterrent effect and thus will most certainly encourage further transgressions of the requirement that the "branch of the national legislature most representative of the people -- the House of Representatives – [must] take the political initiative of taking more money from the people through taxation." Jipping, 53 Buff. L. Rev. at 648. Turning to the wording of Defendant-Appellee's answer, the President, through his counsel, says in the first sentence of his opposition to Plaintiff-Appellants' Motion for Temporary Injunction Pending Appeal: "Plaintiff-Appellants ask this court to enjoin as unconstitutional a federal statute **ENACTED** by Congress . . . " (emphasis supplied).

It is respectfully proffered that to say this bill was properly **"ENACTED"** by Congress would be equivalent to saying that a major change affecting the entire student body of a high school was properly enacted by the student government where the proposal was taken before the student government with much arm twisting and back-locker-room wheeling dealing and then brought to a final vote of the student government after the ordinary and accepted rules for voting upon such a proposal were bent and/or ignored entirely in order to exact the wishes of one strong person who, knowing he lacked the votes to get his proposal through the student government the **PROPER** way, was determined to **have his way** because **HE KNEW WHAT WAS BEST FOR THE ENTIRE SCHOOL!!**

Such was the strength of this one defiant person in the adult world who currently occupies the White House **DETERMINED** that he and he alone knew what was best for the **AMERICAN PEOPLE**. He wasn't asking

them (Massachusetts had shouted him down) he was TELLING THEM, and this Senate measure which ORIGINATED in the Senate was rammed through the House without a S I N G L E bipartisan vote!!!

If allowed to stand, our children and grandchildren and their posterity will surely question how this came about on our watch to begin with and why it was allowed to stand! History records many such ironfisted acts in the past of one man rising to power and managing to have his way with an entire people. Charisma is always part of it, but there is an elusive, mischievous component that we really don't have words for truly. These are questions for the historians and sociologists and social psychologists to answer someday.

Our children and grandchildren will someday ask: "How could the ORIGINATION CLAUSE have been ignored, and once ignored, why was the fact that it had been ignored allowed to stand?" They will ask: "Was the matter brought before the court? Was it immediately enjoined?" The first answer is yes, the matter having been brought before the court by these preeminent physicians. The second answer awaits the final response of the court. The future school books have yet to be written, and prayerfully these young students of the future will read that the court, following initial passage of ObamaCare under circumstances that defied the Constitution, breathed new life into that parchment known as our Constitution by their ruling restoring balance and constitutional order!

One has to wonder what our Founding Fathers would have to say about all this. Their first question might possibly be: "Why was it allowed to get this far to begin with?"

At Page 8 of Defendant-Appellee's opposition in the first sentence of numbered paragraph 2, they state: "Plaintiffs' suit is also barred by the well-established principle that the courts lack the authority to enjoin the

president in performance of his **OFFICIAL** (emphasis supplied) duties." If by "official duties" they mean to include threatening to move the Strategic Air Command out of the State of Nebraska, where it employs 10,000 people, unless Nebraska State Senator Ben Nelson would agree to become the 60th filibuster-proof vote to carry out the Chief Executive's ironfisted will -- if this is to them an "official act" of a proper president, we are witnessing yet another example of the arrogance and aloofness of this current occupant of the White House who places himself above the **PEOPLE** and their Constitution.

C. This Court Can Issue Injunctive Relief Against Subordinate Executive Officials Under The All Writs Act, 28 U.S.C. § 1651(a).

The Government attempts to distinguish *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001) on the grounds that it "concerned a suit against the United States rather than against the President alone in his official capacity." (Opp., p. 8 n. 3.) This is a distinction without a difference. As the Eleventh Circuit recognized, this Court can, pursuant to its powers under the All Writs Act, 28 U.S.C. § 1651(a), issue "commands," i.e., injunctive relief, against subordinate executive officials, even though they were not parties to the original action. *Made in the USA Foundation*, 242 F.3d at 1310 n. 25. Furthermore, while "the only defendant in this action is the President of the United States" (Opp., p. 8), Appellants specifically expressed a willingness to join subordinate executive officials, if necessary, but the District Court denied Appellants' motion for leave to amend without affording Appellants the opportunity to join the appropriate subordinate officers.

II. The Balance Of Harms Tips In Favor Of Issuing A Temporary Injunction Pending Appeal.

The Government argues that temporarily enjoining the PPACA "would result in immediate harm to citizens who benefit from the provisions that take effect this year." (Opp., p. 12.) A temporary injunction, however, could be fashioned to operate prospectively only, thereby protecting citizens who have already received benefits, or who otherwise have obtained vested rights, under the PPACA. *See Lemon v. Kurtzman*, 411 U.S. 192, 197-199 (1973) (expanding doctrine of non-retroactivity to all constitutional law cases). Prospectively, on the other hand, it remains true that "a revenue bill of Senate origin [is] a nullity," *Hubbard v. Lowe*, 226 F. at 140, that "confers no benefits; . . . imposes no duties; . . . affords no protection; . . . creates no office; . . . [and] is in legal contemplation, as inoperative as though it had never been passed." *See Norton v. Shelby County*, 118 U.S. 425, 442 (1886). Thus, a temporary injunction would not cause any legally cognizable harm to citizens.

Counterbalanced against this lack of legal cognizable harm to citizens is the very real, irreparable, and ongoing harm to the constitutional right guaranteed by the Origination Clause, namely the right of "the people . . . to hold the purse strings," 1 *Journal of the Federal Convention* 158 (E.H. Scott ed. 1894), by requiring that "Bills to raise Revenue" originate in the branch of the Congress that is more responsive to the will of the people – the House of Representatives. As demonstrated above, Appellants' constitutional arguments, far from being "tenuous" (Opp., p. 13), in fact demonstrate a strong likelihood of success. The public interest, which the Government fails to address, also favors issuance of a temporary injunction to remedy this constitutional

violation. Consequently, the balance of harms tips decidedly in favor of the issuance of temporary injunctive relief.

III. The Appeal Should Not Be Summarily Dismissed.

The Government points to no rule of court, statute, or case law that allows this appeal to be summarily dismissed without full briefing on the merits or oral argument. This Court's decision in *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997), provides no support for the Government's motion, as the Court in that case did not grant a motion to summarily dismiss the appeal, but rather *after full briefing on the merits of the appeal and oral argument*, 105 F.3d at 904, concluded that the district court's order correctly dismissed the case for lack of standing, and, accordingly, dismissed the appeal. The remedy in this Circuit for a frivolous appeal, moreover, is a Rule 38 motion for sanctions, not summary dismissal. *See* FRAP 38. The Government's cross-motion to dismiss is without any legal foundation.

Furthermore, as discussed above, Appellants have Article III standing as federal taxpayers to assert their claims under the Origination Clause, and those claims are not "wholly insubstantial." (Opp., p. 13.) A constitutional claim is wholly insubstantial "only if the prior decisions *inescapably* render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them [wholly] insubstantial[.]" *See Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (emphasis added), quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973). As more fully set forth above and in their original motion for a temporary injunction pending appeal, Appellants' Origination Clause claims have substantial merit and deserve a fully hearing by this Court.

CONCLUSION

In view of the arguments made and authorities set forth above and in their original motion, Plaintiffs-Appellants respectfully request that their Motion for Reconsideration of the Court's Order of August 10, 2010 denying Appellants' motion for a temporary injunction pending appeal be granted, that an Order be entered enjoining the Defendant President and/or his subordinates from taking any further action to enforce or implement any of the provisions of the PPACA pending the resolution of this appeal and the issuance of the Court's mandate, and

that the Appellee's Cross-Motion to Dismiss Appeal be denied.

Respectfully submitted,

/s/R. Martin Palmer
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Certificate of Service

I, R. Martin Palmer, do hereby certify that a true and correct copy of the foregoing motion, reply and opposition has been electronically served on this1st day of September, 2010, on the following counsel for Defendant-Appellee:

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R. Martin Palmer

Quoting T. Jipping, *TEFRA and the Origination Clause: Taking the Oath Seriously*, 53 Buff. L. Rev. 633, 666 (1986).

The late Senator Everett Dirksen once said, "A billion here, a billion there, pretty soon it adds up to real money." Even taking into account inflation, over $100 billion still adds up to a very substantial amount of "real" money, not "incidental" chump change, as the Government would have it.

"Germane" means "closely akin", "having a close relationship." Webster's Third International Dictionary 951 (1976).

Calendar No. 175
111TH CONGRESS
1ST SESSION **H. R. 3590**

IN THE SENATE OF THE UNITED STATES
OCTOBER 8, 2009
Received and read the first time
OCTOBER 13, 2009
Read the second time and placed on the calendar

AN ACT
To amend the Internal Revenue Code of 1986 to modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees, and for other purposes.
1 *Be it enacted by the Senate and House of Representa*
2*tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**
4 This Act may be cited as the "Service Members
5 Home Ownership Tax Act of 2009".
2
HR 3590 PCS
1 **SEC. 2. WAIVER OF RECAPTURE OF FIRST-**
TIME HOME2
BUYER CREDIT FOR INDIVIDUALS ON QUALI3
FIED OFFICIAL EXTENDED DUTY.
4 (a) IN GENERAL.—Paragraph (4) of section 36(f) of
5 the Internal Revenue Code of 1986 is amended by adding
6 at the end the following new subparagraph:
7 "(E) SPECIAL RULE FOR MEMBERS OF
8 THE ARMED FORCES, ETC.—
9 "(i) IN GENERAL.—In the case of the
10 disposition of a principal residence by an
11 individual (or a cessation referred to in
12 paragraph (2)) after December 31, 2008,

13 in connection with Government orders re14
ceived by such individual, or such individ15
ual's spouse, for qualified official extended
16 duty service—
17 "(I) paragraph (2) and sub18
section (d)(2) shall not apply to such
19 disposition (or cessation), and
20 "(II) if such residence was ac21
quired before January 1, 2009, para22
graph (1) shall not apply to the tax23
able year in which such disposition (or
24 cessation) occurs or any subsequent
25 taxable year.

1 "(ii) QUALIFIED OFFICIAL EXTENDED
2 DUTY SERVICE.—For purposes of this sec3
tion, the term 'qualified official extended
4 duty service' means service on qualified of5
ficial extended duty as—
6 "(I) a member of the uniformed
7 services,
8 "(II) a member of the Foreign
9 Service of the United States, or
10 "(III) as an employee of the in11
telligence community.
12 "(iii) DEFINITIONS.—Any term used
13 in this subparagraph which is also used in
14 paragraph (9) of section 121(d) shall have
15 the same meaning as when used in such
16 paragraph.".
17 (b) EFFECTIVE DATE.—The amendment made by
18 this section shall apply to dispositions and cessations
after
19 December 31, 2008.
20 **SEC. 3. EXTENSION OF FIRST-TIME HOMEBUYER CREDIT**

FOR INDIVIDUALS ON QUALIFIED OFFICIAL EXTENDED DUTY OUTSIDE THE UNITED STATES.

(a) IN GENERAL.—Subsection (h) of section 36 of the Internal Revenue Code of 1986 is amended—

(1) by striking "This section" and inserting the following:

"(1) IN GENERAL.—This section", and

(2) by adding at the end the following:

"(2) SPECIAL RULES FOR INDIVIDUALS ON QUALIFIED OFFICIAL EXTENDED DUTY OUTSIDE THE UNITED STATES.—In the case of any individual who serves on qualified official extended duty service outside the United States for at least 90 days in calendar year 2009 and, if married, such individual's spouse—

"(A) paragraph (1) shall be applied by substituting 'December 1, 2010' for 'December 1, 2009',

"(B) subsection (f)(4)(D) shall be applied by substituting 'December 1, 2010' for 'December 1, 2009', and

"(C) in lieu of subsection (g), in the case of a purchase of a principal residence after December 31, 2009, and before July 1, 2010, the taxpayer may elect to treat such purchase as made on December 31, 2009, for purposes of this section (other than subsections (c) and (f)(4)(D)).".

(b) COORDINATION WITH FIRST-TIME HOMEBUYER CREDIT FOR DISTRICT OF COLUMBIA.—Paragraph (4) of

3 section 1400C(e) of such Code is amended by inserting
4 "(December 1, 2010, in the case of a purchase subject
5 to section 36(h)(2))" after "December 1, 2009".
6 (c) EFFECTIVE DATE.—The amendments made by
7 this section shall apply to residences purchased after
No8
vember 30, 2009.
9 **SEC. 4. EXCLUSION FROM GROSS INCOME OF QUALIFIED**
10 **MILITARY BASE REALIGNMENT AND CLO**11 **SURE FRINGE.**
12 (a) IN GENERAL.—Subsection (n) of section 132 of
13 the Internal Revenue Code of 1986 is amended—
14 (1) in subparagraph (1) by striking "this sub15
section) to offset the adverse effects on housing val16
ues as a result of a military base realignment or clo17
sure" and inserting "the American Recovery and
18 Reinvestment Tax Act of 2009)", and
19 (2) in subparagraph (2) by striking "clause (1)
20 of".
21 (b) EFFECTIVE DATE.—The amendments made by
22 this act shall apply to payments made after February
17, 23 2009.

1 **SEC. 5. INCREASE IN PENALTY FOR FAILURE TO FILE A**
2 **PARTNERSHIP OR S CORPORATION RETURN.**
3 (a) IN GENERAL.—Sections 6698(b)(1) and
4 6699(b)(1) of the Internal Revenue Code of 1986 are
each
5 amended by striking "$89" and inserting "$110".
6 (b) EFFECTIVE DATE.—The amendments made by
7 this section shall apply to returns for taxable years
begin8
ning after December 31, 2009.
9 **SEC. 6. TIME FOR PAYMENT OF CORPORATE**

ESTIMATED
10 **TAXES.**
11 The percentage under paragraph (1) of section
12 202(b) of the Corporate Estimated Tax Shift Act of
2009
13 in effect on the date of the enactment of this Act is in14
creased by 0.5 percentage points.
Passed the House of Representatives October 8,
2009.
Attest: LORRAINE C. MILLER,
Clerk.
Calendar No. 175
111TH CONGRESS
1ST SESSION **H. R. 3590**
AN ACT
To amend the Internal Revenue Code of 1986 to
modify the first-time homebuyers credit in the
case of members of the Armed Forces and certain
other Federal employees, and for other purposes.
OCTOBER 13, 2009
Read the second time and placed on the calendar08 Fmt
6651 Sfmt 6651 E:\BILLS\H3590.PCS H3590 wwoods2
on DSK1DXX6B1PROD with BILLS

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2 and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect*. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

EXHIBIT 2

United States Senate

WASHINGTON, DC 20510

December 16, 2009

The Honorable Carl Levin
Senate Armed Services Committee
Russell Senate Office Building, Room 228
Washington, D.C. 20510 .

The Honorable John McCain
Senate Armed Services Committee
Russell Senate Office Building, Room 228
Washington, D.C. 20510

Dear Senator Levin and Senator McCain:

It has been reported that the Obama Administration threatened the closure of a U.S. military installation for political purposes, thereby bringing into question the integrity of the Base Realignment and Closure (BRAC) process. The BRAC process was established to remove political influence so that the decision to close or not to close a military installation could be based upon military utility.

Specifically, various media reports have stated that the Obama Administration would put Offutt AFB in south-eastern Nebraska on a future BRAC list because of a vote on healthcare reform. While we recognize the importance of Offutt AFB as the headquarters of U.S. Strategic Command and the approximately 10,000 individuals that work there, we feel that this installation should remain open or be closed on its own merits.

Therefore, we respectfully ask that a hearing be held as to whether the BRAC process has been compromised. We do not want to see the name of a base from our state on a

BRAC list and think it has been put there to settle partisan scores. We also do not want our bases to be more vulnerable to closure because political arm-twisting has taken another installation off the table, National security not partisanship should determine how BRAC decisions are made.

Sincerely,

